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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No.

DUSIAN ALFRED KRIVOSKI, *Petitioner*,

v.

THE UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

DUSIAN ALFRED KRIVOSKI, your petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Claims, entered in the above-entitled case on October 2, 1956.

OPINION BELOW

The opinion of the court below (Appendix A, *infra*, pp. A1-A26) has not yet been reported.

JURISDICTION

The opinion of the court below dismissing petitioner's petition in that court (Appendix A, *infra*, pp. A1-A26) was filed on October 2, 1956. Under the practice of the Court of Claims, there is no formal judgment additional

to an opinion dismissing a petition. The jurisdiction of this Court is invoked under 28 U.S.C. §1255(1).

QUESTIONS PRESENTED

1. Whether the doctrine of *Johnson* v. *Zerbst*, 304 U.S. 458, is applicable to judgments of conviction by court-martial.

2. Whether a conviction by court-martial may be collaterally attacked after the accused's release from confinement, by way of a suit for back pay in the Court of Claims, where the accused makes a showing that he was deprived of substantial rights under the Fifth and Sixth Amendments in the court-martial proceedings.

3. Whether an accused is deprived of the effective assistance of counsel in violation of the Sixth Amendment where he is assigned counsel who is infected with a prior loyalty to a conflicting interest that counsel does not disclose and that the accused does not waive, and where counsel's representation of the accused is in consequence perfunctory and inadequate.

4. Whether an accused is denied due process of law in violation of the Fifth Amendment, where his appellate counsel is denied access, in the course of appellate proceedings subsequent to conviction, to the opinions that are then under review in those proceedings.[1]

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[1] In the event that certiorari is granted, petitioner reserves the right to argue that there was a failure on the part of the Court of Claims to make any findings of fact on certain material issues; that portions of that court's ultimate findings 18 and 21 are not sustained by its findings of evidentiary or primary facts; and that its finding 30 is utterly without any support in the evidence. For the present authority of this Court with respect to the review of facts found by the Court of Claims, see *United States* v. *Penn Mfg. Co.*, 337 U.S. 198, 207-208, note 4.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

The pertinent constitutional provisions, statutes, and regulations involved in this case are set forth in Appendix B, *infra* pp. A27-A36.

STATEMENT

The facts are set forth in detail in the Court of Claims' findings, *infra* pp. A10-A26. For purposes of the present petition, they may be stated in somewhat less detail as follows:

A. Petitioner, Finley, and the Certificate Transactions

After creditable enlisted and commissioned service in World War II, petitioner was duly separated from active duty, and in 1947 was promoted to the grade of Captain, Finance Department Reserve. In February 1948, he re-enlisted in the Army, and in August 1948 he was recalled to active duty as a First Lieutenant, Finance Department, Army of the United States. (Fdg. 2, p. A10.)

In August 1950, petitioner was on duty as deputy disbursing officer at the Army Finance Center, Friedberg, Germany. The Finance Detachment there was commanded by Captain Willard E. Finley. The commanding officer and central disbursing officer at the Finance Center was Colonel Samuel J. Taggart. (Fdg. 3, p. A10.)

As deputy disbursing officer, petitioner had full and untrammeled access to the vault, and keys to all parts thereof here material. The vault had a corridor and four rooms. Three of these were reached from the corridor, while the fourth was an annex accessible only from one of the corridor rooms. (Fdg. 3, pp. A10-A11.)

At this time, military and civilian personnel of the U. S. Army in Germany were paid only in military payment certificates, which were periodically withdrawn from

circulation, counted, and then destroyed. Such a periodic destruction was scheduled for August 3, 1950. (Fdg. 4, p. A11.)

A committee of three officers, including Captain Finley, was appointed, and on that date met the petitioner and went with him into the vault to count the certificates. The certificates were in the annex room, from which they were taken into the adjoining corridor where the committee worked. When all the certificates were counted, they were placed in footlockers in the annex room. The committee and the petitioner then went to lunch, and the certificates were destroyed in the afternoon. (Fdg. 5, p. A11.)

For some months prior to August 1950, Captain Finley had on numerous occasions suggested to the petitioner that the latter should take a bundle of these certificates for their own use from the mutilated currency that was periodically destroyed, and on August 3, 1950, Finley twice repeated the suggestion, once before and once after lunch. (Fdg. 6, p. A11.)

Before the committee reconvened, petitioner returned to the annex room of the vault, took a bundle of certificates with a face value of $9,990 out of a footlocker, placed that bundle in a metal cashier's box in the corridor room of the vault, and went out to witness the burning. (Fdg. 6, p. A12.)

Later that afternoon Colonel Taggart had occasion to go into the corridor room of the vault, noticed the cashier's box therein, brought it upstairs and opened it, and found the certificates inside. Petitioner had meanwhile become apprehensive about his actions, and, when he heard that Colonel Taggart had brought the box up, sought him out and told him everything he had done. This was the first inkling Colonel Taggart had had of the facts, as there were several innocent explanations for the presence of the certificates in the cashier's box. (Fdg. 6, p. A12.)

B. The Participants' Stories and the Charges Against Them

That afternoon and again on the following morning, Colonel Taggart talked both to the petitioner and to Finley.

Petitioner said it was Finley who had originally suggested that he take some of the certificates on the occasions of the periodic destructions, that the proceeds be divided between them, and that this suggestion had been frequently repeated, the last time at noon of August 3, 1950.

Finley told Colonel Taggart that he had been wrongfully accused by the petitioner. He also said that he was afraid the petitioner would take the certificates, and that he was afraid that, if Colonel Taggart had not found the certificates, petitioner would not have divided with him. (Fdg. 7, p. A12.)

On August 4, petitioner was barred from further access to the vault and was directed to surrender his keys. On August 7, both he and Finley were placed in arrest in their respective quarters in Friedberg. On the same day, after being warned of his rights and read AW 24, *infra*, p. A29,[2] petitioner made a full and complete written statement to agents of the Army's Criminal Investigation Division incriminating himself and implicating Finley, substantially as he had previously related the facts to Colonel Taggart. (Fdg. 8, pp. A12-A13.)

On August 11, Colonel Taggart preferred charges against both the petitioner and Finley.

Charge I against the petitioner alleged a violation of AW 96, *infra*, p. A33, consisting of conspiring with Finley to steal a package of military payment certificates in the amount of $9,990.

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[2] As in the Court of Claims' findings, all references to the Articles of War in this petition are to those in effect during 1950 and through May 30, 1951, viz., those enacted by the Act of June 4, 1920, as amended by Title II of the Act of June 24, 1948 (10 U. S. C. [Supp. II to 1946 ed.] §§ 1471-1593).

Charge II against the petitioner alleged a violation of AW 93, *infra*, p. A32, consisting of stealing $9,990 worth of military payment certificates in conjunction with Finley.

Charges I and II against Finley alleged violations of AW 94 and AW 95, not relevant here.

Charge III against Finley alleged a violation of AW 96, *infra*, p. A33, consisting of conspiring with the petitioner to steal a package of military payment certificates in the amount of $9,990.

Charge IV against Finley alleged a violation of AW 93, *infra*, p. A32, consisting of stealing $9,990 worth of military payment certificates in conjunction with the petitioner.

The charges against the petitioner and Charges III and IV against Finley involved the identical package of military payment certificates. (Fdg. 9, pp. A13-A14.)

C. Events Prior to Finley's Trial

On August 18, 1950, the charges against Finley were investigated as required by AW 46(b) and par. 35*a*, MCM.[3] Thereafter, the charges and the allied papers were referred for advice to the Staff Judge Advocate, pursuant to AW 47(b) and par. 35*b*, MCM. That officer, Lt. Col. Weisler,[4] on August 29, 1950, recommended that the charges against Finley be referred for trial to a general court-martial, and on that day they were so referred by the Commanding Officer, Frankfurt Military Post, to a general court-martial appointed by him. Lt. Col. Weisler contemplated that

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[3] As in the findings of the Court of Claims, all references to the Manual for Courts-Martial in this petition are to the *Manual for Courts-Martial, U. S. Army, 1949*, (Ex. Order 10020, 13 Fed. Reg. 7519), which was in force during 1950 and through May 30, 1951.

[4] Similarly following the pattern of the Court of Claims' findings, all references to military personnel in this petition indicate the rank held by such personnel at the time referred to.

the prosecution would use the petitioner as a witness against Finley, and so indicated in his letter of advice. (Fdg. 10, p. A15.)

The trial judge advocate of the court-martial to which charges against Finley were referred was Major James E. Atkins, Jr., since deceased, and the appointed military defense counsel was Captain Roy H. Adams. Finley was principally defended, however, by Milton J. Teiger, Esq., a civilian lawyer, also since deceased, as individual counsel selected by the accused. (Fdg. 11, pp. A15-A16.)

The charges against petitioner had, at this time, been neither formally investigated nor referred for trial. They were held in abeyance on orders of the Commanding Officer, Frankfurt Military Post, and were not served upon him. Petitioner was still in arrest in quarters, and had not been told whether he would or would not be tried. (Fdg. 12, p. A16.)

Early in September, while in such arrest, petitioner was visited by Captain Adams, who as the regularly appointed defense counsel for Finley was interviewing all witnesses in the Finley case. Adams told petitioner that, under AW 24, *infra*, A29, he was not required to incriminate himself in any testimony he might give at Finley's trial. None the less, petitioner still believed he had no other choice in the matter that would meet the compulsion of his conscience, and told Adams he would testify. (Fdg. 12, p. A16.)

D. Finley's Trial

At Finley's trial, both Teiger and Adams were present to represent Finley. All three cooperated in presenting Finley's defense. At trial they functioned as a team with mutual respect for each other, with Teiger assuming the active role as defense counsel. Adams was prepared to assume Finley's defense in the event Teiger were to with-

draw or could not be present. Adams represented Finley with undivided loyalty. (Fdg. 13, pp. A16-A17.)

Prior to Finley's trial, a *nolle prosequi* had been entered as to Charge II. He was arraigned on the remaining charges and specifications and, through Teiger, pleaded not guilty to all of them. Petitioner was the principal witness against Finley as to Charges II and IV, and, except as to some admissions by Finley testified to by Colonel Taggart, was the only witness directly connecting Finley with the military payment certificate transactions alleged in Charges III and IV. Petitioner did not claim his privilege against self-incrimination in respect of his testimony as to those transactions, although he was reminded of his rights. (Fdg. 14, p. A17.)

The matters set forth above, pp. 3-5,[5] were presented in detail. At the close of the prosecution's evidence, Teiger moved for findings of not guilty as to Charge IV, pursuant to MCM, ¶72*a*, essentially because petitioner "is confessing to a crime he never committed." Adams heard this motion argued; it was denied. Finley did not testify as to the transactions alleged in Charges III and IV. (Fdg. 14, p. A17.)

At the close of all the testimony, the court-martial found Finley guilty of all charges and specifications, and sentenced him to dismissal, total forfeitures, and five years' confinement. (Fdg. 14, p. A17.)

E. Events After Finley's Trial and Prior to Petitioner's

Later on the same day that the Finley court-martial adjourned, the charges against petitioner were referred for pretrial investigation pursuant to AW 46(b) and MCM ¶35*a*, and the investigation took place on October 6, 1950. Adams, who had previously represented Finley, appeared

[5] Specifically, the matters set forth in Fdgs. 3-7, pp. A10-A12; see Fdg. 14, p. A17.

at the pretrial investigation as counsel for the petitioner, and without objection from the petitioner, represented him there; pursuant to Adams' advice, petitioner made no statement at the investigation. (Fdg. 15, pp. A17-A18.)

At the conclusion of the pretrial investigation, petitioner requested Major Gaddis, on duty in Austria, as his defense counsel for the trial, but Adams, upon being told that Gaddis was not a lawyer, said that he was not available to act (Def. Ex. 8).[6] "No definite appointment of defense counsel was made by [petitioner] at this time, and it was tacitly understood that Captain Adams would protect the [petitioner's] interests until the question of defense counsel could be resolved. It was optional in [petitioner's] mind whether he was defended by Adams or some other person. He expressed no preference, gave no serious thought to the matter, had no conscious dissent to being represented by Adams, and expected Adams to represent him." (Fdg. 15, p. A18.)

On recommendation of Lt. Col. Weisler, the staff judge advocate, to whom the charges against petitioner and the allied papers were referred, Charge I was stricken, and Charge II was referred for trial on October 11, 1950, to a general court-martial appointed by the Commanding Officer, Frankfurt Military Post. On the next day, a copy of the charges was served on the petitioner. (Fdg. 16, pp. A18-A19.)

On Weisler's recommendation, the remaining charge against the petitioner was referred to a court composed of members other than those who had heard the Finley case, because Weisler considered such prior connection disqualifying. A different law member was also appointed. Major Atkins and Captain Adams were reappointed trial

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[6] In this instance, petitioner contends that the court below failed to make a finding on a material fact resting on an exhibit introduced by the United States without any limitation.

judge advocate and defense counsel, respectively. Weisler was familiar with the facts involving the petitioner and Finley as they were reflected in the papers accompanying the Finley charges [see pp. 6-7, *supra*], but he did not consider that Adams, who had been regularly appointed defense counsel in many cases at Frankfurt Military Post, was disqualified by any conflict of interest from representing the petitioner. Weisler made no effort to recommend the appointment as defense counsel of any officer not connected with the Finley case because the existence of a possible conflict of interest did not occur to him. (Fdg. 16, p. A19.)

Petitioner had been in arrest in quarters since August 7, 1950. Until attending the pretrial conference on October 6, he had not been told that any charges against himself had been sworn to, or that he would be tried. Between those dates petitioner made no effort to obtain counsel, and the staff judge advocate's office had not provided him with counsel before October 6. (Fdg. 17, p. A19.)

The terms of petitioner's arrest in quarters were set forth in a written communication, since lost (Fdg. 17, p. A20). But petitioner believed that, while in such status, he was forbidden to see or communicate with anyone or even to use the telephone; and Army Regulations then in force provided that "A person in arrest * * * will make requests of every nature in writing, unless otherwise authorized." (Tr. 136, 289; ¶7*c*, AR 600-320, 22 April, 1949).[7]

On October 6 petitioner discussed with Adams the question of retaining civilian counsel. Adams advised against it because civilian counsel might antagonize the

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[7] Here again, petitioner asks for a material finding on uncontradicted evidence. ("Tr." refers to the transcript of testimony in the Court of Claims.)

court-martial, as had occurred in the Finley trial. (Fdg. 18, p. A20.)[8]

In all, petitioner had three conferences with Captain Adams after the pretrial investigation and before the trial. (Fdg. 18, p. A20.)

The first, in Adams' car driving from Frankfurt back to Friedberg after the pretrial investigation, consisted of generalizations. (Fdg. 18, p. A20.)

The second, on October 16, lasted about three hours, and involved discussion of the elements of the offense, whether they could be proved, and how to plead; decision on the latter point was left open. "The [petitioner] indicated he would be bound by Captain Adams' advice. Although lacking a professional appreciation of the legal requirements to prove the crime charged, [petitioner] clearly thought he had committed an offense of some description. He was mentally reconciled to a dismissal from the service as a punishment and at that time was concerned primarily with avoiding imprisonment. He depended on the advice of counsel to select the alternative that would best serve the desired result." (Fdg. 18, p. A20.)

Prior to the trial, Adams had discussed with Weisler the question of clemency if the petitioner pleaded guilty; Weisler said he could hold out no assurances as it was the policy of the reviewing authority not to make any deals. (Fdg. 19, p. A21.)

Prior to the trial, likewise, Adams had considered but rejected the possibility of entering on petitioner's behalf a plea of guilty to the lesser included offense of an attempt

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[8] The court below found that "This advice was an exercise of Captain Adams' best judgment and there is no showing that it was not motivated in the best interests of the [petitioner] or was not sound under the circumstances prevailing." It is petitioner's view that this is an ultimate finding that is not sustained by the Court of Claims' findings of evidentiary facts.

in violation of AW 96, *infra*, p. A33; "Adams had discussed this with [petitioner], who was content to rest on the judgment of his counsel." (Fdg. 19, p. A21.)

F. Petitioner's Trial

Petitioner's trial took place on October 19. Adams appeared as petitioner's counsel and was accepted by him as such. There were no challenges by either side. Adams pleaded petitioner guilty, the law member explained the meaning of the plea, and petitioner persisted therein. (Fdg. 20, p. A21.)

The prosecution called four witnesses, including Colonel Taggart, and introduced the statement petitioner had given the CID on August 7 (*supra*, p. 5). The defense called three officers and two enlisted men as character witnesses. Petitioner took the stand to testify to his personal and military background, but was not asked any questions to elicit what he had told Colonel Taggart, the CID, and the Finley court-martial, viz., that Finley had repeatedly importuned him to take the certificates. (Fdg. 20, pp. A21-A22.)

Petitioner was found guilty, and was sentenced to dismissal, total forfeitures, and two years' confinement (Fdg. 20, p. A22). The entire trial, from beginning to end, had lasted just one hour and ten minutes.[9]

"If, in legal contemplation, a conflict of interest existed between the positions of Captain Finley and the [petitioner] so as to disqualify Captain Adams to represent the [petitioner] after previously representing Captain Finley, this conflict did not occur to Captain Adams or to the staff judge advocate or to [petitioner], was not explained by Captain Adams or the staff judge advocate to [petitioner, and] did not cause Captain Adams

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[9] It began at 1:10 P.M. and adjourned at 2:20 P.M. Pl. Ex. 1, pp. 2, 41.

or the staff judge advocate to explain to [petitioner] specifically that he had rights to the assistance of counsel untainted by prior loyalties to a conflicting interest." (Fdg. 21, p. A22.)[10]

G. Events Following Both Trials

On October 24, 1950, Weisler recommended, pursuant to AW 47(c) and MCM, ¶87*b*, that the findings and sentence in petitioner's case be approved, and that the term of confinement be not mitigated, notwithstanding that "Without the testimony and cooperation of the accused a conviction could not have been obtained in the case of Captain FINLEY." Petitioner's sentence was accordingly approved in its entirety by the Commanding Officer, Frankfurt Military Post, on the same day. (Fdg. 22, pp. A22-A23.)

On the next day, Adams submitted a clemency letter on petitioner's behalf recommending that the portion of the sentence extending to confinement be suspended. Adams made six points, including the argument that the Government suffered no loss. The matters set forth in the clemency letter were not presented to the court-martial after it found petitioner guilty and before it sentenced him, and the letter itself was submitted too late for consideration by the reviewing authority, who had already acted on petitioner's record of trial the day before. (Fdg. 23, p. A23.)

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[10] The court below went on to find that "It is reasonable to conclude that Captain Adams' defense of [petitioner] would have been the same as that which actually transpired even if he had not previously represented Captain Finley." In petitioner's view, this is either an ultimate finding completely contrary to the findings of primary fact, or else, in view of *Glasser* v. *United States*, 315 U.S. 60, 76, it is a conclusion of law as to the effect of conflicting loyalties on the effectiveness or otherwise of representation by counsel.

On October 30, Weisler completed his review of Finley's record of trial. He held it legally sufficient, and, with respect to sentence, advised the reviewing authority that "It is believed that the 5 years confinement imposed in this case appears to be somewhat disproportionate to the sentence imposed in the KRIVOSKI case inasmuch as the two officers involved are equally involved in the offenses charged against them of which they have been found guilty." However, in view of the additional offenses in the Finley case, Weisler recommended a somewhat more severe sentence for Finley, of three years' confinement, and the reviewing authority on the next day reduced Finley's sentence accordingly. (Fdg. 24, pp. A23-A24.)

H. Appellate Proceedings in Both Cases

Petitioner and Finley were sent to Governors Island, New York, and their respective records of trial reached the Office of The Judge Advocate General of the Army. Finley retained Thomas H. King, Esq., as appellate counsel. Petitioner also sought to retain Mr. King and sent him a copy of his record of trial and a retainer. (Fdg. 25, p. A24.)

Mr. King declined petitioner's representation because of his apprehension of a possible conflict of interest between petitioner's case and Finley's, essentially because petitioner implicated Finley and the latter denied having importuned petitioner. Mr. King accordingly transmitted petitioner's record of trial and the full remittance—of $1,000 (Tr. 313, 329)—to petitioner's present counsel, without any deduction or forwarding fee. (Fdg. 25, pp. A24-A25.)

"This was the first intimation [petitioner] had from any source that Captain Adams' representation of both Captain Finley and the [petitioner] involved a possible conflict of interest." (Fdg. 25, p. A25.)

After Finley's conviction had been affirmed by the Board of Review, with modifications not relevant here, affidavits were received from Finley and Teiger challenging the fairness of the trial. Finley's affidavits impugned Adams' loyalty, alleging *inter alia* that Adams had been too friendly with the trial judge advocate. Adams submitted a counter-affidavit in which he set forth under oath the details of his representation of and complete loyalty to Finley. (Pl. Ex. 7, pencilled pp. 42-45, 13-17; 12 BR-JC 127.)

The Judicial Council held that the trial was fair and that Adams had not been disloyal to Finley; affirmed the findings of guilty as to Charge I as modified by the Board of Review; affirmed the finding of guilty as to Charge IV, on the ground that Finley had counseled petitioner to take the certificates; disapproved the finding of guilty as to Charge III, holding that no conspiracy was shown to exist; and recommended that the sentence as to confinement be reduced to two years. The Judge Advocate General concurred and reduced the sentence accordingly. Finley was in consequence dismissed from the Army, and in time completed service of his sentence. (12 BR-JC 127, 145, 158; GCMO 34, Dept. of the Army, 1951; Tr. 319.)[11]

Petitioner's present counsel argued and briefed petitioner's case before the Board of Review, which affirmed the conviction.

Thereafter, petitioner's counsel wrote The Judge Advocate General requesting that he be furnished with the review made by the staff judge advocate and the opinion of the Board of Review, which documents were wanted in order to prepare a presentation to the Judicial

[11] The matters set forth in this paragraph and the one immediately preceding it are drawn from the references cited; in this instance also the court below failed to make findings as to material facts.

Council before which the case was then pending. The Judge Advocate General denied the request. (Fdg. 26, p. A25.)

The opinion of the Board of Review that was requested has since been reported, has never been classified, and copies of the volume in which it now appears are on open shelves. The review of the staff judge advocate requested has never been classified, was first made available to petitioner's counsel at the hearing before the Commissioner in October 1954, and was admitted as a plaintiff's exhibit. The review of the staff judge advocate in Finley's case is similarly unclassified, was included in the Finley record of trial that was produced in response to a call, and is also an exhibit in this case. (Fdg. 27, p. A25.)

Petitioner's case was argued and briefed before the Judicial Council, which affirmed petitioner's conviction but recommended that the confinement be reduced to one year; The Judge Advocate General concurred and reduced the confinement accordingly. Petitioner's dismissal was announced in Department of the Army General Court-Martial Orders as effective from midnight, March 30, 1951. He remained in confinement until July 2, 1951, at which time he was released on a parole that expired August 18, 1951. (Fdg. 28, p. A26.)

A petition for new trial pursuant to AW 53, *infra*, p. A32, as reenacted, was filed on petitioner's behalf on October 2, 1951, was orally argued, and was denied by The Judge Advocate General on January 2, 1952. (Fdg. 29, p. A26.)

Some—but not all—of the foregoing facts were presented to the military authorities reviewing petitioner's successive applications. The following matters were not presented: the determination to hold the charges against petitioner in abeyance (Fdg. 12, p. A16); the interview between petitioner and Captain Adams in the latter's capacity as

Captain Finley's counsel (Fdg. 12, p. A16); the views of Lieutenant Colonel Weisler as to disqualifications and conflict of interests (Fdg. 16, p. A19); the discussion between Captain Adams and the petitioner with reference to retaining civilian counsel (Fdg. 18, p. A20); the extent to which petitioner depended on Captain Adams' advice (Fdgs. 18 and 19, pp. A20-A21); the fact that Captain Adams had given actual consideration to pleading petitioner guilty to a lesser included offense (Fdg. 19, p. A21); the failure of both Captain Adams and Lieutenant Colonel Weisler to explain or disclose conflict of interest to the petitioner (Fdg. 21, p. A22); the fact that Captain Adams' clemency letter was submitted too late (Fdg. 23, p. A23); Mr. King's refusal of petitioner's appellate representation because of possible conflict of interest with Mr. King's prior retainer by Captain Finley (Fdg. 25, pp. A24-A25); and the fact that Mr. King's refusal to represent petitioner in the appellate proceedings was the first intimation petitioner had had from any source as to the conflict of interest involved in Captain Adams' dual representation (Fdg. 25, p. A25). The excepted matters were not presented to the military authorities at any time, and were first brought to light at the hearings before the Commissioner in the Court of Claims.[12]

I. The Present Proceeding

Following his release from confinement, petitioner brought the present suit in the Court of Claims, on the

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[12] The foregoing paragraph is based entirely on documentary evidence, viz., the several exhibits covering the successive stages of petitioner's trial and its sequelae (Pl. Ex. 1-4, 8, 10-12; Def. Ex. 5, 7-11) and Finley's record of trial (Pl. Ex. 7). It was stipulated at the trial (Tr. 200-201) that the complete military records had been introduced into evidence. This indisputable documentary proof makes it clear that Court of Claims' finding 30 (p. A26), that "The facts presented in this report were available and presented to the military authorities reviewing [petitioner's] successive applications," is completely without the support of substantial evidence.

footing that the court-martial and the appellate proceeding subsequent thereto, pursuant to which he was purportedly dismissed from the Army, were null and void, not because jurisdictionally void *ab initio*, but because the court-martial lost jurisdiction for two reasons (Petition, ¶¶ 4, 14, 15, 17):

First, because petitioner was deprived of the effective assistance of counsel at his trial by court-martial, essentially because, without effective waiver on his part, he was assigned as his counsel an officer who had represented a prior conflicting interest, in consequence of which his representation by such counsel was perfunctory and inadequate.

Second, because petitioner was denied due process of law in the conduct of the appellate proceedings that followed his trial by court-martial, inasmuch as his appellate counsel was denied access during the pendency of those proceedings to the opinions that were under review.

Petitioner accordingly sought as recovery the difference between the pay and allowances that he would have earned had he been continued on duty after the date of his purported dismissal, less a reduction, by way of "just credit and off-set" (*Borak* v. *United States*, 110 C. Cls. 236, 248, certiorari denied, 335 U.S. 821) in the amount of any sums earned by petitioner in private employment (see Fdg. 31, p. A26).

The Court of Claims dismissed the petition and denied review, essentially because it believed itself precluded by *Burns* v. *Wilson*, 346 U.S. 137, and *Hiatt* v. *Brown*, 339 U.S. 103, from reviewing the court-martial proceedings (Appendix A at pp. A8-A9). There is a suggestion in the opinion below (p. A8) that petitioner waived Captain Adams' disqualification, and an apparent holding (p. A9) that what was done was not so flagrant as to deprive the

court-martial of jurisdiction once it had been regularly constituted.

REASONS FOR GRANTING THE WRIT

This petition presents the question, not heretofore decided by this Court, whether the doctrine of *Johnson* v. *Zerbst*, 304 U.S. 458, to the effect that a court otherwise competent may lose jurisdiction if in the course of a trial it deprives an accused of constitutional protections, is applicable to a judgment of conviction by court-martial. That doctrine, never questioned here in nearly twenty years in respect of collateral review of convictions by state and federal civil courts, has been ratified and accepted by Congress. See the first paragraph of 28 U.S.C. § 2255. Whether that principle is also applicable to judgments of courts-martial was neither argued nor decided in *Hiatt* v. *Brown*, 339 U.S. 103, and was not determined with the weight of precedent in *Burns* v. *Wilson*, 346 U.S. 137, inasmuch as in the latter case there was no opinion of the Court. The question is one of continuing importance under the Uniform Code of Military Justice, which contains the same "finality" provision found in the Articles of War under which petitioner was convicted, compare Art. 76, UCMJ, with AW 50(h) of 1948, *infra*, pp. A31, A33, and which changed the military appellate structure only by substituting a Court of Military Appeals for the Judicial Council established under the 1948 Articles of War.

First. About ten years ago, the Court of Claims expressly and specifically held that the doctrine of *Johnson* v. *Zerbst*, 304 U.S. 458, justified the setting aside of a conviction adjudged by an otherwise regularly constituted court-martial, where the accused had been deprived of substantial rights under the Sixth Amendment. *Shapiro* v. *United States*, 107 C. Cls. 650, 654-655. The Government then did not contest that ruling further,

and promptly stipulated the amount of the judgment due thereunder. 108 C. Cls. 754. Now, however, the Court of Claims apparently feels itself precluded by *Hiatt* v. *Brown*, 339 U.S. 103, and *Burns* v. *Wilson*, 346 U.S. 137, from following the rationale of its earlier ruling in the *Shapiro* case.

Those decisions, however, did not decide the present issue. Neither party in *Hiatt* v. *Brown* cited or argued *Johnson* v. *Zerbst* (No. 359, Oct. T. 1949; see 346 U.S. at 848) and the Court's opinion does not discuss the problem. *Hiatt* v. *Brown*, therefore, cannot be an authority for a proposition that was neither decided nor presented for decision. "The most that can be said is that the point was in the cases if anyone had seen fit to raise it. Questions which merely lurk in the record, neither brought to the attention of the Court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." *Webster* v. *Fall*, 266 U.S. 507, 511.

And, although the issue was raised in *Burns* v. *Wilson*, 346 U.S. 137, see separate opinion on denial of rehearing, 346 U.S. 844-851, there was no opinion of the Court in that case, see 346 U.S. at 138, inasmuch as five of the nine Justices participating did not concur as to the ground of decision. Accordingly, under this Court's well settled rule (*United States* v. *Pink*, 315 U.S. 203, 216; *Hertz* v. *Woodman*, 218 U.S. 205, 212-214), the decision in *Burns* v. *Wilson* is not a precedent; "the lack of an agreement by a majority of the Court on the principles of law involved prevents it from being an authoritative determination for other cases."

The basic question presented by this petition is therefore not foreclosed by any decision here.

If the ruling below is permitted to stand, then questions which may be raised on collateral attack of either a judgment of conviction adjudged by a constitutional court

of the United States (e.g., *Johnson* v. *Zerbst*, 304 U.S. 458) or of one entered by a state court of general criminal jurisdiction after appeal to and affirmance by the highest court of the state (e.g., *Leyra* v. *Denno*, 347 U.S. 556), are not open to judicial scrutiny when the judgment of conviction under collateral attack is that of a court-martial, which is an executive agency, which has only a limited jurisdiction, and which is constituted only for the particular case. In Winthrop's words (*Military Law and Precedents* [2d ed. 1896] *54 [1920 reprint, pp. 49-50]), "As a purely executive agency designed for military uses, called into existence by a military order and by a similar order dissolved when its purpose is accomplished, the court-martial, as compared with the civil tribunals, is transient in its duration and summary in its action. It is not, in a legal sense, a 'court of record' * * *." Yet under the ruling below, a conviction by such an *ad hoc* executive tribunal is immune from further scrutiny even though that conviction violated constitutional guarantees, while a similar conviction by a state or federal court of general jurisdiction must meet and withstand searching judicial inquiry when assailed as involving a similar infirmity.

Petitioner cannot believe that this either is or should be the law. As is pointed out below, he made a substantial showing that the military authorities deprived him of critical constitutional protections. He should have the right to have his contentions as to those matters tested by the same standards as if he had made and proved similar allegations concerning a conviction in a civil court, state or federal.

Second. The question is one of obvious and continuing public importance, notwithstanding the supersession of the 1948 Articles of War by the Uniform Code of Military Justice. Nothing turns on the differences effected by the Code. Thus, Art. 76, UCMJ, *infra*, p. A33, has the

same "finality" provision that was in AW 50(h) of 1948, *infra*, p. A31; it is petitioner's contention that AW 50(h) does not bar collateral review,[1] but neither his contentions nor this Court's ultimate decision would be any different if the case turned on Art. 76 of the Uniform Code.

Moreover, while the Code created a Court of Military Appeals to review decisions of Boards of Review, that tribunal represented essentially a substitution for the Judicial Council which had had similar functions under the 1948 Articles of War. In each instance, the present question as to the scope of collateral attack is identical —and still open. The scope of military jurisdiction today, when millions of citizens are under arms, emphasizes the necessity for an authoritative adjudication as to whether military judgments are entitled to greater immunity than those of civil courts, state and federal.

Third. The heart of petitioner's first substantive contention is that at and before his trial he was denied the effective assistance of counsel in violation of the Sixth Amendment, because, without understanding waiver, he was furnished with counsel who had previously represented a conflicting interest with undivided loyalty, and whose defense of petitioner was in consequence perfunctory and inadequate.

1. Adams represented both Finley and the petitioner despite the existence of a plain, sharp, and irreconcilable conflict between them.

Petitioner and Finley were separately charged with the joint commission of two offenses, first, of taking the military payment certificates, and second, of conspiring

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[1] Inasmuch as the executive did not respect the "finality" of AW 50(h), see 41 Op. Atty. Gen. No. 8, there is no reason why courts should be bound by its provisions. See 346 U.S. at 849-850.

to take them (Fdg. 9, pp. A13-A14).[2] Only petitioner actually had his hands on the certificates. Finley's guilt of the taking rested on the circumstance that he importuned, advised, and counseled petitioner to do what he did, and it was only on this footing that his guilt of the substantive offense was ultimately sustained (12 BR-JC 145, 158). Finley's guilt was proved almost exclusively by petitioner's testimony as to what Finley had said (Fdg. 14, p. A17). But Finley's position, from the outset to the bitter end, was that he had been wrongly accused, and that he had not importuned petitioner (Fdgs. 7, 25, pp. A12, A25).

On those undisputed facts, it is plain that counsel for Finley was required to deny what counsel for petitioner was in duty bound to assert. It was for this reason that Mr. King, who had been retained as appellate counsel for Finley, declined the subsequent proffer of appellate representation from petitioner (Fdg. 25, pp. A24-A25). Inescapably, therefore, there was a conflict of interest in the sense of the 6th Canon of Professional Ethics, viz., "Within the meaning of this canon, a lawyer represents conflicting interests when, in behalf of one client, it is his duty to contend for that which duty to another client requires him to oppose." And, as *Glasser* v. *United States*, 315 U.S. 60, shows, representation by a lawyer with conflicting loyalties so taints a conviction that it cannot stand.

The holding below is contrary not only to *Glasser*, but to consistent rulings in other federal courts setting aside convictions because the conflict of interest on the part of defending counsel was such as to deprive the accused of the effective assistance of counsel. *Craig* v. *United States*,

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[2] The conspiracy allegation against petitioner was stricken before his trial (Fdg. 16, p. A19). The same allegation against Finley was ultimately disapproved by the Judicial Council for failure of proof (12 BR-JC 145).

217 F. 2d 355 (C. A. 6); *Butzman* v. *United States*, 205 F. 2d 343 (C. A. 6); *Taylor* v. *United States*, 226 F. 2d 337 (D. C. Cir.), reversing 126 F. Supp. 764 (D. D. C.); *Scott* v. *District of Columbia*, 99 A. 2d 641 (D. C. Mun. App.), affirmed, 214 F. 2d 860 (D. C. Cir.); see *Tucker* v. *United States*, 235 F. 2d 238 (C. A. 9).

Indeed, the federal courts have been so zealous to prevent violations of the 6th Canon that, in appropriate cases, orders have been entered disqualifying attorneys from representing the client who retained them when it was shown that they had previously represented another client who had a conflicting interest. *Laskey Bros.* v. *Warner Bros. Pictures*, 224 F. 2d 824 (C. A. 2), certiorari denied, 350 U. S. 932; *Consolidated Theatres* v. *Warner Bros. Cir. Man. Corp.*, 216 F. 2d 920 (C. A. 2); *Fisher Studio* v. *Loew's Inc.*, 232 F. 2d 199, certiorari denied, 352 U. S. 836.

2. The circumstance that counsel is appointed and salaried rather than individually retained and compensated does not relieve him from the disqualification that arises out of the prior representation of a conflicting interest. *Craig* v. *United States*, 217 F. 2d 355, 359 (C. A. 6); *Merrick* v. *American Security & Trust Co.*, 107 F. 2d 271, 278 (D. C. Cir.), certiorari denied, 308 U.S. 625.[3] Indeed, the Supreme Court of Illinois, which recently set aside a conviction on collateral attack because of the incompetence of the public defender, there decided that a court-appointed lawyer is to be held to a higher standard of competence than one who is selected and retained by the defendant himself. *People* v. *Morris*, 3 Ill. 2d 437, 445, 452-453, 121 N.E. 2d 810, 815, 819.

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[3] No civil decision of which petitioner is aware supports the reasoning of the Board of Review in this case (12 BR-JC 81, 85), that "Military counsel, in any event, from the nature of their office which precludes any financial gain for their defense of an accused person, are free from imputations of disloyalty which may attach to counsel for hire in similar circumstances."

3. Adams' representation of petitioner was perfunctory and inadequate. To summarize very briefly—

(i) After three conferences with petitioner, in a case with whose facts Adams was thoroughly familiar, he did not even make his final decision how to plead petitioner until they were walking into the courtroom on the day of the trial (Fdg. 19, p. A21). Plainly, *pro forma* representation does not satisfy the constitutional requirement. *Powell* v. *Alabama*, 287 U.S. 45, 58.

(ii) Adams had one point of law and one point of fact to present, and presented neither.

The only—and obvious—point of law was that, since the certificates never left the vault, petitioner was guilty only of an attempt in violation of AW 96, *infra* p. A33; see MCM, ¶183*c*. Under military practice, Adams could have pleaded petitioner guilty to the lesser included offense. MCM, ¶¶71, 78*b*, 78*c*. Adams was aware of the precise point (Fdgs. 14, 19, pp. A17, A21), which under the authorities was more than simply "arguable."[4]

The only—and obvious—point of fact to be presented was the mitigating circumstance that petitioner had been repeatedly importuned by a senior officer to do what he eventually did (Fdg. 6, p. A11). This was never brought out through petitioner's own lips (Fdg. 20, pp. A21-A22), and Adams himself admitted that having it called to the court's attention only through the reading of petitioner's CID statement (*ibid.*) was not the best way of presenting it (Tr. 283).

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[4] *People* v. *Barnes*, 158 App. Div. 712, 143 N.Y. Supp. 885, appeal dismissed, 210 N.Y. 612, 104 N.E. 1136; *Chaplin* v. *Lee*, 18 Neb. 440; *McAleer* v. *State*, 46 Neb. 116, 64 N.W. 358.

Note that, in *Gibbs* v. *Burke*, 337 U.S. 773, 782, where "questionable issues [were] allowed to pass unnoticed" in a felony case where the defendant was not offered counsel, this Court held that he did not have a trial "that measures up to the test of fairness prescribed by the Fourteenth Amendment."

(iii) Petitioner's plea of guilty left the sentence as the only issue. This was a discretionary matter with the court (MCM, ¶80a, and p. 137) to be based on matter in mitigation presented to it (*id.*, ¶79). Adams knew petitioner was concerned primarily with avoiding imprisonment (Fdg. 18, p. A20), and he was himself aware of at least six mitigating factors (Fdg. 23, p. A23), a number of which had occurred to him before the trial (Tr. 278-280, 282). None were presented to the court-martial (Fdg. 23, p. A23). Similar nonfeasance in a federal court would have resulted in a remand for resentencing. *Gadsden* v. *United States*, 223 F. 2d 627 (D. C. Cir.).

(iv) Adams' final lapse was delaying his clemency letter so that it was not available for consideration by the reviewing authority (Fdg. 23, p. 23A).

4. Adams' utterly incompetent defense of petitioner was a direct consequence of his prior and continuing loyalty to the adverse interest of Finley. That loyalty first came to light when, as Finley's counsel, Adams attempted—very properly—to prevent petitioner from testifying against his client (Fdg. 12, p. A16). That loyalty persisted in Adams' representation of Finley at the latter's trial (Fdg. 13 at p. A17). That loyalty is apparent from every paragraph of the post-trial affidavit submitted by Adams in the Finley case after his own loyalty to Finley had been questioned, three months after the conclusion of petitioner's trial (Pl. Ex. 7, pencilled pp. 13-17; *supra*, p. 15). That loyalty was testified to by Adams here (Tr. 264). And that prior, continuing, and overriding loyalty is the only explanation for Adams' sorry performance in petitioner's case, which once again proves the truth of the timeless precept that "No man can serve two masters: for * * * he will hold to the one and despise the other." Holding to Finley, Adams could not but despise petitioner, whose testimony had so effectively sealed Finley's fate.

5. There is no foundation for the intimation of waiver in the opinion below (p. A8). The existence of a disqualifying conflict of interest did not occur to Weisler nor to Adams (Fdgs. 16, 21, pp. A19, A22), neither individual explained conflict of interest to petitioner (Fdg. 21, p. A22), neither explained to him that he had rights to the assistance of counsel untainted by prior loyalties to a conflicting interest (*ibid.*), and petitioner did not in fact learn anything about conflict of interest until he was returned to this country as a prisoner after his trial (Fdg. 25, pp. A24-A25). In those circumstances, plainly, there was no understanding waiver of his constitutional rights. *Emspak* v. *United States*, 349 U.S. 190, 198; *Von Moltke* v. *Gillies*, 332 U.S. 708; *Johnson* v. *Zerbst*, 304 U.S. 458, 464.

6. The net of the foregoing is that the ruling of the court below on the first substantive constitutional issue is at variance with every right-to-counsel case decided in this Court for over twenty years. It should therefore not be permitted to stand without further review.

Fourth. Following his trial by court-martial, petitioner was denied due process of law in violation of the Fifth Amendment, because, prior to the hearing before the Judicial Council, his appellate counsel was denied access both to the staff judge advocate's review and to the opinion of the Board of Review.

The Articles of War then in effect provided for automatic appellate review, both by the convening authority's staff judge advocate, then by a Board of Review, and finally, since an officer was involved, by the Judicial Council and The Judge Advocate General. AW 47, AW 48, AW 49, AW 50.

The review of the staff judge advocate was required by law to be made (AW 47(c); MCM, ¶87*c*), and it was in fact made (Fdg. 22, pp. A22-A23). Since an officer was

involved, the case had first to be examined by a Board of Review (AW 50(d)(2), *infra*, p. A30; MCM, ¶96*b*); it was in fact so examined (Fdgs. 26-27, p. A25), and an opinion written, as required by AW 50(d).

The further travel of the case depended on the Board's holding. If the Board held the record of trial legally sufficient, the case went to the Judicial Council (AW 50(d)(2)). If the Board found the record legally insufficient, it was required to submit its holding to The Judge Advocate General (AW 50(d)(3), *infra*, p. A30). If that officer concurred, that disposed of the case (*ibid.*). But if he did not concur in the Board's holding of insufficiency, then its holding was transmitted to the Judicial Council under AW 50(d)(4), *infra*, p. A31.

Therefore, once petitioner's appellate counsel had been advised of the hearing before the Judicial Council, there necessarily had been a holding of legal sufficiency, either by the Board or by The Judge Advocate General—but until counsel could see the Board's opinion, he would not know who had held what or which paragraph of AW 50(d) was applicable.

Petitioner's counsel was accorded a hearing and the right to file briefs before the Judicial Council; this was not a matter of grace, but was specifically accorded by MCM, ¶99, *infra*, p. A36. But he was denied the right to see either the staff judge advocate's review or the opinion of the Board of Review, although neither document was ever classified for security reasons, and although the latter now appears on open library shelves (Fdgs. 26-27, p. A25).

The foregoing facts establish a denial of due process.

1. Since appellate review was required by law, it follows that the proceedings before the several appellate tribunals that successively reviewed the findings and sentence of the court-martial before which petitioner was

tried are part of that process of law by which his conviction must be tested. *Cole* v. *Arkansas*, 333 U.S. 196, 201; *Frank* v. *Mangum*, 237 U.S. 309, 327.

2. True, petitioner's counsel had a hearing before the Judicial Council (Fdg. 28, p. A26). But the right to be heard, standing alone, is not enough. As Chief Justice Hughes said in *Morgan* v. *United States*, 304 U.S. 1, 18:

> "The right to a hearing embraces not only the right to present evidence but also a reasonable opportunity to know the claims of the opposing party and to meet them. The right to submit argument implies that opportunity; otherwise the right may be but a barren one."

Here petitioner's counsel, having been denied the right to see the rulings under review, was unable "to know the claims of the opposing party." He was denied equal access to the file, a denial which, as this Court held in *Gonzales* v. *United States*, 348 U.S. 407, involves a deprivation of due process of law. As was there said (pp. 414, 415), "The petitioner was entitled to know the thrust of the Department's recommendation so he could muster his facts and arguments to meet its contentions. * * * Just as the right to a hearing means the right to a meaningful hearing, * * * so the right to file a statement before the Appeal Board includes the right to file a meaningful statement, one based on all the facts in the file and made with awareness of the recommendations and arguments to be countered."

Tested by the foregoing standards, it is plain that, by requiring petitioner to proceed in ignorance of unclassified documents required by law to be made, he was denied an essential ingredient of due process of law in the appellate review of his conviction.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be granted.

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Counsel for the Petitioner.

OCTOBER 1956.

APPENDIX

APPENDIX A

OPINION AND FINDINGS BELOW

IN THE UNITED STATES COURT OF CLAIMS

No. 234-52

(Decided October 2, 1956)

DUSIAN ALFRED KRIVOSKI v. THE UNITED STATES

Mr. Frederick Bernays Wiener for the plaintiff.
Mr. Francis X. Daly, with whom was *Mr. Assistant Attorney General George Cochran Doub,* for the defendant.

OPINION

JONES, *Chief Judge,* delivered the opinion of the court:

Plaintiff, a veteran of World War II, was in December 1945 released to inactive service. He remained an officer in the Reserve Corps until February 9, 1948, when he reenlisted in the grade of technical sergeant. On August 10, 1948, he was recalled to active duty as a first lieutenant, Finance Department, Army of the United States, and in 1949 was sent overseas.

Plaintiff was convicted in a court-martial proceeding and given a sentence of confinement at hard labor for 2 years (later reduced to 1 year) and dismissed from the service. He alleges that the court-martial proceeding was void on the ground that he was deprived of the right to be represented by disinterested counsel in violation of the Sixth Amendment to the Constitution, and that he was denied due process of law in violation of the Fifth Amendment.

The facts are clearly stated in the findings filed with this opinion.

In August 1950 plaintiff was on duty at the Army Finance Center at Friedberg, Germany. The commanding officer and central disbursing officer was Col. Samuel J. Taggart. Subordinate to him were Capt. Willard E. Finley who commanded the finance detachment of about 35 enlisted men, and the plaintiff who was deputy disbursing officer.

As such deputy plaintiff had access to the vault, including keys to all parts of it, as well as to safes in the finance center. The vault had a corridor and four rooms, three of which had doors into the corridor; the fourth was an annex room and could be reached only through one of the corridor rooms.

Both military and civilian personnel stationed in Germany at that time were paid in military certificates. It was necessary from time to time to withdraw these certificates for destruction. On the particular occasion involved herein about $478,000 of such certificates were to be destroyed.

Three officers were designated as a committee to supervise the destruction of the certificates. Captain Finley was one of this committee. The committee met with plaintiff on August 3, 1950, and went with him to the vault to count the certificates which were in the annex room. After counting, the certificates were placed in foot lockers in the annex room. The committee and plaintiff then went to lunch, the plan being to complete the destruction during the afternoon.

Prior to this particular time Captain Finley had on several occasions suggested to the plaintiff that the latter should purloin a bundle of the currency for their own use from the supply that was periodically withdrawn and destroyed. Just before the committee went to lunch on August 3, 1950, Captain Finley telephoned the plaintiff to come to his office and there repeated the suggestion and said this would be a good opportunity to take a package of currency to be divided between them.

Before the committee reconvened plaintiff returned to the annex room, took a bundle of certificates with a face value

of $9,900 out of the foot locker and placed it in a metal cashier's box that was in the corridor room of the vault. He then went out to witness the burning.

Later that afternoon Colonel Taggart had occasion to go into the corridor room of the vault, noticed the cashier's box therein, brought it upstairs and found the certificates inside. Meanwhile, plaintiff had become disturbed and when he heard that Colonel Taggart had brought the box upstairs, sought him out and told him everything he had done. This was the first intimation Colonel Taggart had of the facts. Plaintiff also told Colonel Taggart that Captain Finley had originally suggested some 8 months previously that some of the certificates be withheld from these periodical destructions, the proceeds to be divided between them, and that Captain Finley had repeated this suggestion on numerous occasions. Captain Finley denied the charges.

Both Captain Finley and plaintiff were placed under arrest and were subjected to court-martial procedure. Two charges were made against plaintiff and four against Captain Finley, two of which are not relevant here. These are set out in finding 9.

Prior to the trial the case against Captain Finley set out in Charge II was dismissed, but he was tried on the other three charges. The remaining charges included conspiracy to commit larceny and the commission of theft in conjunction with the plaintiff.

Plaintiff was the principal witness against Captain Finley. Plaintiff did not claim his privilege against incrimination, although he was reminded of his rights.

The appointed military defense counsel at the general court-martial proceeding was Capt. Roy H. Adams, Infantry, a member of the bar of the Supreme Court of Texas. Captain Finley, however, was principally defended by Milton J. Teiger, an American lawyer practicing in Germany, who was selected by the accused. Mr. Teiger and

Captain Adams worked together at the trial of Captain Finley.

At the close of the prosecution's evidence Mr. Teiger moved for a finding of not guilty with respect to Charge IV, the theft charge, on the ground that the plaintiff herein, Krivoski, "is confessing to a crime he never committed." After argument the motion was denied. Captain Finley did not testify. He was found guilty and sentenced "to be dismissed the service, to forfeit all pay and allowances * * * and to be confined at hard labor * * * for five years."

Later the same day the charges against plaintiff were referred for pretrial investigation pursuant to Article of War 46 (b). The investigation took place on October 6, 1950. Captain Adams, who had previously represented Captain Finley, appeared at the pretrial investigation at the direction of the staff judge advocate and offered his services to plaintiff as defense counsel, offering in the alternative to secure other services for plaintiff if the latter preferred. Plaintiff stated that he had no objection to being represented by Captain Adams in the pretrial investigation. At the conclusion of the pretrial investigation plaintiff gave Captain Adams several names including that of Major Shelton Gaddis, whom he wanted to appear at the trial as character witnesses in his behalf. No definite appointment of defense counsel was made at this time, and it was tacitly understood that Captain Adams would protect the plaintiff's interests until the question of defense counsel could be resolved. Plaintiff understood that he had the option of being represented by Adams or some other person. He expressed no preference, apparently gave no serious thought to the matter, did not dissent to being represented by Adams and expected him to represent him.

At the trial Charge I was stricken and Charge II was the basis of the trial. At the trial Captain Adams was named as defense counsel to defend the plaintiff.

Lt. Col. Julian E. Weisler, the staff judge advocate, recommended that the general court-martial be composed of others than those who heard the case of Captain Finley. He was familiar with the facts involved in the action against plaintiff, but he did not consider that Captain Adams was disqualified by any conflict of interest from representing the plaintiff. Captain Adams had been a regularly appointed defense counsel in many cases at this particular post.

During the period from August 7 until October 6, 1950, the plaintiff made no effort to obtain counsel, civil or military, and prior to the date of the trial had neither requested nor been refused counsel. Plaintiff had three conferences with Captain Adams after the pretrial investigation and before the trial. At one of these conferences there was a discussion covering the elements of the offense charged and whether the prosecution could prove them, and also a discussion as to how to plead. Decision on the latter point was left open. Although Captain Adams explained to the plaintiff that the ultimate decision as to how to plead would be made by plaintiff, he replied that he would be bound by Captain Adams' advice. Plaintiff evidently thought he had committed an offense of some description, was reconciled to a dismissal from the service, and was primarily concerned with avoiding imprisonment.

Captain Adams finally advised that plaintiff plead guilty. The plaintiff acquiesced, the thought being that such a plea might induce clemency from the reviewing authorities.

The prosecution called four witnesses, including Colonel Taggart, and introduced the statement that plaintiff had made on August 7, 1950, and which is referred to in finding 8. The defense called Colonel Taggart, Maj. Shelton Gaddis, Lieutenant Hays and two enlisted men as character witnesses. Plaintiff also testified. He was not asked any questions to elicit what he had told Colonel Taggart and the Finley court-martial to the effect that Captain Finley had

repeatedly importuned him to take the certificates, although these facts were recited in plaintiff's written statements of August 7, 1950, which statement was a part of the record before the court-martial.

Plaintiff was found guilty and was sentenced to be dismissed, to forfeit all pay and allowances, and to be confined at hard labor for two years.

Lieutenant Colonel Weisler, the staff judge advocate, recommended in writing on October 24, 1950, approval of the findings and sentence, but stated in that connection that without the testimony and cooperation of the accused a conviction could not have been obtained in the case of Captain Finley.

On October 25, 1950, Captain Adams submitted to the commanding officer of the military post a clemency letter on plaintiff's behalf, recommending that the portion of the sentence extending to confinement be suspended. He gave several reasons as set out in finding 23. The facts set forth in this letter were not presented to the court-martial before plaintiff was sentenced and the letter itself was not submitted by Captain Adams until the day after the action of the reviewing authority set out in finding 22.

The respective records of the trials in the two court-martial cases were presented to the office of the Judge Advocate General of the United States Army. Captain Finley retained as appeal counsel Thomas H. King of Washington, D. C. Plaintiff also sought to retain Mr. King and sent him a copy of his record of trial and also a retainer. Mr. King declined to represent plaintiff because of his apprehension of a possible conflict of interest in plaintiff's case and that of Captain Finley, essentially because plaintiff implicated Captain Finley and the latter denied having importuned plaintiff to take the bundle of military certificates. Mr. King transmitted plaintiff's record of trial and the full remittance to plaintiff's present counsel.

The plaintiff earnestly insists that at and before the trial by court-martial he was denied the effective assistance of counsel in violation of the Sixth Amendment because he was furnished with counsel who had previously represented a conflicting interest, and that as a consequence the defense of the plaintiff was perfunctory and inadequate. The plaintiff relies upon this court's decision in the case of *Shapiro* v. *United States*, 107 C. Cls. 650. However, in that case the plaintiff was being tried by a court-martial on the charge that he had delayed the orderly progress of a general court-martial when he was acting as attorney for the defense in another court-martial trial. It seems that in the previous trial he was representing an American soldier of Mexican descent who was charged with assault and attempt to rape. The defendant in that case vigorously maintained that it was not he who committed the assault. Shapiro, who was counsel for the defendant in the assault case, in order to demonstrate a mistake in identity, had substituted for the accused another American soldier of Mexican descent. The substitute soldier was convicted, whereupon Shapiro informed the court of the deception he had practiced. Shapiro then in turn was tried by general court-martial because of such deception. Shapiro was notified at 12:40 p. m. September 3, 1943, that he would be tried at 2:00 p. m. on that same day at Kearney, Nebraska, 35 to 40 miles from the place where the charges had been served on him. Plaintiff had selected Capt. James J. Mayfield to represent him but this officer was named in the order preferring the charges as the Trial Judge Advocate. Plaintiff therefore at 12:40 was put to the necessity of procuring other counsel to represent him. He selected two lieutenants, neither of them being a lawyer. When the court convened he moved for a continuance of 7 days on the ground that his counsel had not had sufficient time to prepare a defense. The motion was denied and he was put to trial. At 5:30 that afternoon he was convicted and sentenced to be dismissed from the service. The court held in that case that it was

a flagrant case of military despotism against a defendant who at most had merely demonstrated the fallibility of the judgment of his superior officers and made them look ridiculous, and that it was a complete denial of plaintiff's constitutional rights; that his rights had been denied when counsel had been refused an opportunity to prepare his defense, and that the entire procedure showed denial of plaintiff's rights under the Fifth and Sixth Amendments.

The facts in that case were completely different from and far stronger than in the case at bar.

The plaintiff also cites the case of *Glasser* v. *United States*, 315 U. S. 60. In that case counsel was appointed to represent plaintiff along with the co-defendant over the objection of plaintiff. It was a case in which notice was given to the judge that interests might be inconsistent and where the counsel for defense of one defendant might be less effective than if he had represented the defendant alone.

In the case at bar the plaintiff accepted the appointment of counsel without protest, the cases were tried separately, the plaintiff's counsel did not represent Captain Finley on appeal, and full time was given for the preparation of the case. The court-martial was duly constituted, had jurisdiction of the person accused and of the offense charged, and we do not think it was subject to collateral attack or judicial review. *Burns* v. *Wilson*, 346 U. S. 137; *Hiatt* v. *Brown*, 339 U. S. 103.

Plaintiff's case was briefed and argued by plaintiff's counsel in the present case before the Judicial Council which, on March 12, 1951, recommended that plaintiff's confinement be reduced to one year. The Judge Advocate General concurred and the sentence was accordingly reduced to one year; otherwise plaintiff's conviction and sentence were approved. No doubt the present counsel, who is skilled in such matters, fully presented all the facts of the case before the Judicial Council.

We quote from the case of *Burns* v. *Wilson, supra,* as follows:

> Military law, like state law, is a jurisprudence which exists separate and apart from the law which governs in our federal judicial establishment. This Court has played no role in its development; we have exerted no supervisory power over the courts which enforce it; the rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty, and the civil courts are not the agencies which must determine the precise balance to be struck in this adjustment. The Framers [of the Constitution] expressly entrusted that task to Congress.

We think that in all the circumstances the plaintiff's sentence might well have been further reduced. However, the fact remains that he took the $9,900 with the intent of appropriating it to his own use and that of Captain Finley, and while there are some mitigating circumstances, he, by his own confession, which was voluntarily made, admitted that this was his purpose. He decided to make a full disclosure only after he found that Colonel Taggart, the commanding officer, had discovered the military certificates which had been taken by him and placed in a cashier's box to which he had the key.

Since we are not a reviewing court, we are not permitted to pass upon errors or mistakes in judgment unless they are so flagrant as to make the action of a regularly formulated military tribunal null and void, or to deprive it of jurisdiction once it has been regularly constituted.

We do not think the facts of this case justify such action on the part of this court as would result in a judgment for the full pay and allowances from the time of the court-martial proceedings as a continuing claim.

The petition is dismissed.

LARAMORE, *Judge;* MADDEN, *Judge;* WHITAKER, *Judge;* and LITTLETON, *Judge,* concur

FINDINGS OF FACT

The court, having considered the evidence, the report of Commissioner C. Murray Bernhardt, and the briefs and argument of counsel, makes findings of fact as follows:

1. Plaintiff is a citizen of the United States and of the State of Illinois, residing in Chicago. He has been married since February 1946 and has three children. There is no evidence as to when the children were born.

2. Plaintiff enlisted in the United States Army on August 14, 1940, served in the ranks until commissioned on October 27, 1943, as a second lieutenant, Finance Department, was promoted to first lieutenant on July 1, 1944, and served overseas in World War II, receiving three battle stars. He was separated from active duty on December 28, 1945.

After World War II he remained in the Reserve Corps, and on February 13, 1947, was promoted to the grade of captain, Finance Department Reserve. On February 9, 1948, he reenlisted in the grade of technical sergeant and served on active duty in that grade, after which, on August 10, 1948, he was recalled to active duty as a first lieutenant, Finance Department, Army of the United States. On August 2, 1949, he was once more sent overseas.

3. In August 1950 plaintiff was on duty at the 7752nd Army Finance Center, Friedberg, Germany. The commanding officer and central disbursing officer of that installation was Colonel Samuel J. Taggart. Subordinate to him were Captain Willard E. Finley, who commanded the Finance Detachment of about 35 enlisted men, and the plaintiff, who was deputy disbursing officer.

As such deputy, plaintiff had full and untrammeled access to the vault, and had keys to all parts thereof with an exception here immaterial, as well as to all safes in the finance center. The vault had a corridor and four rooms, three of which were reached from the corridor, and the last was an

annex that could only be reached from one of the corridor rooms.

4. Military and civilian personnel of the United States Forces stationed in Germany at this time were paid only in military payment certificates. These certificates were periodically withdrawn from circulation and, after counting, were destroyed at the finance center. On August 3, 1950, an experiment was scheduled to be conducted to determine feasible means of destruction of the certificates in the event that a withdrawal of American forces became necessary. Approximately $478,000 worth of military payment certificates were to be destroyed on this occasion.

5. The commanding officer, Frankfurt Military Post, appointed a committee of three officers in connection with this scheduled experimental destruction, consisting of a Major Jones, Lieutenant Hayes, and the Captain Finley referred to in finding 3. This committee met the plaintiff on August 3, 1950, and went with him into the vault to count the certificates. The certificates were in the annex room, from which they were taken into the adjoining corridor room where the committee worked. When the committee's work was completed, all of the certificates had been taken from the corridor room and placed in footlockers in the annex room. At this juncture the committee, accompanied by the plaintiff, went out to lunch, and the scheduled destruction of the certificates was accomplished in the afternoon.

6. For some months prior to August 1950, Captain Finley had on numerous occasions suggested to the plaintiff that the latter should purloin a bundle of currency for their own use from the mutilated currency that was periodically destroyed. Before the committee went to lunch on August 3, 1950, Captain Finley telephoned the plaintiff to come to his office and there repeated the suggestion and, after lunch, while the boxes containing the counted currency were being carried out for destruction, Captain Finley again said that this would be a good opportunity to take a package of currency.

Before the committee reconvened plaintiff returned to the annex room, took a bundle of certificates with a face value of $9,900 out of a footlocker, and placed that bundle in a metal cashier's box that was in the corridor room of the vault. Thereafter he went out to witness the burning. Later that afternoon Colonel Taggart had occasion to go into the corridor room of the vault, noticed the cashier's box therein, brought it upstairs and, upon opening it, found the certificates inside. Plaintiff had meanwhile become apprehensive about his actions and, when he heard that Colonel Taggart had brought the box up, sought him out and told him everything he had done. This was the first inkling Colonel Taggart had had of the facts, as there were innocent explanations for the presence of the certificates in the cashier's box.

7. That afternoon and again the following morning Colonel Taggart talked to both the plaintiff and to Captain Finley.

The plaintiff told Colonel Taggart that it was Captain Finley who had originally suggested, some eight months previously, that he take some of the certificates scheduled for destruction on the occasions of the periodic destructions, and that the proceeds of such taking be divided between them. The plaintiff further told Colonel Taggart that Captain Finley had repeated this suggestion on numerous occasions, the last one at noon of this same day.

Captain Finley told Colonel Taggart that he had been wrongfully accused by the plaintiff. He also said that he was afraid the plaintiff would take the certificates, that he almost asked to be relieved from membership on the committee in consequence of that fear, and that he was afraid that, if Colonel Taggart had not found the certificates, plaintiff would not have divided with him.

8. On August 4, 1950, plaintiff was barred from further access to the vault and was directed to surrender his keys. Three days later, on August 7, 1950, both he and Captain

Finley were placed in arrest in their respective quarters in Friedberg until further notice. On the same day the plaintiff made a full and complete written statement to agents of the Army's Criminal Investigation Division, incriminating himself and implicating Captain Finley, setting forth what he had done and what Captain Finley had asked him to do substantially to the same effect as he had previously related the facts to Colonel Taggart. The CID agents had warned plaintiff in advance of his rights and read to him the 24th Article of War.

9. On August 11, 1950, Colonel Taggart preferred charges against both plaintiff and Captain Finley, as follows:

The charges against the plaintiff were these:

CHARGE I: Violation of the 96th Article of War.

Specification: In that First Lieutenant Dusian A KRIVOSKI, FD, 7752 Finance Center, did, at Friedberg, Germany, on or about 1 October 1949, conspire with Captain Willard E FINLEY, 7752 Finance Center, to commit an offense against the United States, to wit: larceny, by stealing Military Payment Certificates intended for destruction as mutilated currency, and that the said First Lieutenant Dusian A KRIVOSKI did, for the purpose of effecting the object of said conspiracy, feloniously steal one package of mutilated Military Payment Certificates in the total amount of nine thousand, nine hundred and ninety dollars ($9,990.00).

CHARGE II: Violation of the 93d Article of War.

Specification: In that First Lieutenant Dusian A KRIVOSKI, FR 7752 Finance Center, in conjunction with Captain Willard E FINLEY, 7752 Finance Center, did, at Friedberg, Germany, on or about 3 August 1950, feloniously steal nine thousand, nine hundred and ninety dollars ($9,990.00) in Military Payment Certificates, the property of the United States.

The charges against Captain Finley were these:

Charge I involved two specifications alleging violations of the 94th Article of War in connection with a motion picture projector, not relevant here.

Charge II involved one specification alleging a violation of the 95th Article of War, not relevant here.

The remaining charges against Captain Finley were:

CHARGE III: Violation of the 96th Article of War.

Specification: In that Captain Willard E FINLEY, Inf, 7752 Finance Center, did, at Friedberg, Germany, on or about 1 October 1949, conspire with First Lieutenant Dusian A KRIVOSKI, 7752 Finance Center, to commit an offense against the United States, to wit: larceny, by stealing Military Payment Certificates intended for destruction as mutilated currency, and that the said First Lieutenant Dusian A KRIVOSKI did, for the purpose of effecting the object of said conspiracy, feloniously steal one package of mutilated Military Payment Certificates in the total amount of nine thousand, nine hundred and ninety dollars ($9,990.00).

CHARGE IV: Violation of the 93d Article of War.

Specification: In that Captain Willard E FINLEY, Inf, 7752 Finance Center, in conjunction with First Lieutenant Dusian A KRIVOSKI, 7752 Finance Center, did, at Friedberg, Germany, on or about 3 August 1950, feloniously steal nine thousand, nine hundred and ninety dollars ($9,990.00), in Military Payment Certificates, the property of the United States.

The charges against the plaintiff and Charges III and IV against Captain Finley involved the identical package of military payment certificates.

All references to the Articles of War in this report are to those in effect during 1950 and through May 30, 1951, namely, those enacted by the act of June 4, 1920, as amended by Title II of the act of June 24, 1948 (10 U. S. C., Supp. II to 1946 ed., secs. 1471-1593).

10. On August 18, 1950, the charges against Captain Finley were investigated as required by Article of War 46 (b) and paragraph 35 *a* of the Manual for Courts-Martial.

Thereafter those charges, the report of the investigating officer, and the allied papers were referred to the staff judge advocate for advice in pursuance of Article of War 47 (b) and paragraph 35 *b* of the Manual. Included in the allied papers were the statement made by the plaintiff to agents of the Army's Criminal Investigation Division referred to in finding 8, and a statement by Colonel Taggart setting forth in detail the substance of the facts set out in finding 7. Included in the report of the investigating officer was testimony by the plaintiff and by Colonel Taggart to the same effect.

On August 29, 1950, the Staff Judge Advocate, Lieutenant Colonel Julian E. Weisler, recommended that the charges against Captain Finley be referred for trial to a general court-martial. On the same day they were so referred by order of the commanding officer, Frankfurt Military Post, to a general court-martial appointed by said officer. Lieutenant Colonel Weisler contemplated that the prosecution would use the plaintiff as a witness against Captain Finley, and so indicated in his letter of advice.

All references in this report to the Manual for Courts-Martial are to the Manual for Courts-Martial, U. S. Army, 1949 (Ex. Order 10020, 13 Fed. Reg. 7519), which was in force during 1950 and through May 30, 1951.

All references to military personnel in this report indicate the rank held by such personnel at the time referred to.

11. The trial judge advocate of the general court-martial to which the charges against Captain Finley were referred was Major James E. Atkins, Jr. He died before this case was heard. The appointed military defense counsel of that

general court-martial was Captain Roy H. Adams, Infantry, a member of the bar of the Supreme Court of Texas. Captain Finley was principally defended, however, by Milton J. Teiger, Esq., an American lawyer practicing in Germany, as individual counsel selected by the accused. Mr. Teiger also died before this case was heard.

12. The charges against the plaintiff had not been formally investigated or referred for trial at this time but were held in abeyance on orders of the commanding officer, Frankfurt Military Post. Plaintiff meanwhile was still in arrest in quarters. He had not been told that he would or would not be tried. No charges had been served on him.

Early in September, while in such arrest, plaintiff was visited by Captain Adams who, as the regularly appointed defense counsel for Captain Finley, was interviewing all witnesses in the Finley case. Plaintiff was listed as a prosecution witness on the Finley charge sheet. Captain Adams told the plaintiff that, under the provisions of the 24th Article of War, he was not required to incriminate himself in any testimony he might give at the Finley trial. Notwithstanding this advice, plaintiff still believed he had no other choice in the matter that would meet the compulsion of his conscience, and told Captain Adams that he would testify. Plaintiff is a person of normal intelligence capable under normal circumstances of understanding the advice given him by Captain Adams and others.

13. Because of postponements requested by Mr. Teiger, the trial of Captain Finley did not commence until September 28, 1950. Both Mr. Teiger and Captain Adams were present to represent Captain Finley. All three, Finley, Adams, and Teiger, cooperated in presenting the accused's defense, although the pretrial cooperation between Adams and Teiger was spasmodic. At trial they functioned as a team with mutual respect for each other, with Teiger assuming the active role as defense counsel. Captain Adams

was prepared to assume the defense of Captain Finley in the event that Mr. Teiger were to withdraw or could not be present. Captain Adams represented Captain Finley with undivided loyalty, as required by the Manual.

14. Prior to the trial, a *nolle prosequi* had been entered by the convening authority as to Charge II against Captain Finley. He was arraigned on the remaining charges and specifications and, through Mr. Teiger, pleaded not guilty to all of them. Plaintiff was the principal witness against Captain Finley in respect to Charges III and IV and, except as to some admissions by Finley testified to by Colonel Taggart, was the only witness directly connecting Captain Finley with the military payment certificate transactions alleged in said Charges III and IV. Plaintiff did not claim his privilege against self-incrimination in respect of his testimony concerning those transactions, although he was reminded of his rights. The matters set forth in findings 3 to 7 were presented in detail. At the close of the prosecution's evidence, Mr. Teiger moved for findings of not guilty with respect to Cnarge IV, pursuant to paragraph 72 *a* of the Manual, essentially because Krivoski "is confessing to a crime he never committed". Captain Adams heard this motion argued; it was denied. Captain Finley did not testify concerning the transactions alleged in Charges III and IV. At the close of all the testimony the court-martial found Captain Finley guilty of all charges and specifications and sentenced him "to be dismissed the service, to forfeit all pay and allowances to become due after the date of the order directing execution of the sentence, and to be confined at hard labor * * * for five years".

15. Captain Finley's court-martial adjourned at 12:10 a.m., on October 3, 1950. Later that day the charges against plaintiff were referred for pretrial investigation pursuant to Article of War 46 (b) and paragraph 35 *a* of the Manual and, on October 6, 1950, the investigation took place. Captain Adams, who had previously represented

Captain Finley, appeared at the pretrial investigation at the direction of the staff judge advocate and offered his services to plaintiff as defense counsel, offering in the alternative to secure other services for plaintiff if the latter preferred. Plaintiff said he had no objection to being represented by Captain Adams at the pretrial investigation and the latter did so. Plaintiff made no statement at the investigation pursuant to advice from Captain Adams.

At the conclusion of the pretrial investigation plaintiff gave Captain Adams the names of several persons, including a Major Sheldon Gaddis, whom he wanted to appear at trial as character witnesses in his behalf.[1] No definite appointment of defense counsel was made by plaintiff at this time, and it was tacitly understood that Captain Adams would protect the plaintiff's interests until the question of defense counsel could be resolved. It was optional in plaintiff's mind whether he was defended by Adams or some other person. He expressed no preference, gave no serious thought to the matter, had no conscious dissent to being represented by Adams, and expected Adams to represent him.

16. The charges against the plaintiff, the allied papers, and the report of investigation were referred to Lieutenant

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[1] A sharp conflict exists on this point. Plaintiff testified that, on October 6, 1951, he told Adams that he wanted to be represented by Major Gaddis, an officer then on duty in Austria, that when Adams asked him if Gaddis was a lawyer he replied he thought not, whereupon Adams advised that defense counsel was required to be a lawyer. As a result plaintiff testified, in effect, to a relinquishment of the thought of being represented by Gaddis, although later he learned that Gaddis was to appear as a character witness. On the other hand, Captain Adams testified that plaintiff never expressed a desire to be defended by Gaddis, but suggested his name solely as a character witness. On the balance of the evidence, the inconclusiveness of plaintiff's recollections on the subject, and his failure to communicate with Gaddis although having opportunities to do so, it is reasonable to conclude that plaintiff is mistaken in his recollection.

Colonel Weisler, the staff judge advocate. This officer recommended that Charge I be stricken, and that Charge II be referred for trial. The charges as thus amended were accordingly referred for trial on October 11, 1950, to a general court-martial appointed by the commanding officer, Frankfurt Military Post and, on the following day, a copy of the charges was formally served on the accused.

On Lieutenant Colonel Weisler's recommendation, the charges against plaintiff were referred to a general court-martial composed of members other than those who heard the case of Captain Finley, because Lieutenant Colonel Weisler considered that such prior connection disqualified them. A different law member was also appointed. Major Atkins, who had prosecuted Captain Finley as trial judge advocate, was named as trial judge advocate to prosecute the plaintiff, and Captain Adams was named as defense counsel to defend the plaintiff. Lieutenant Colonel Weisler was familiar with the facts involved in the action against plaintiff and Captain Finley as they were reflected in the papers accompanying the charges against the latter, but he did not consider that Captain Adams was disqualified by any conflict of interest from representing the plaintiff. Captain Adams had been a regularly appointed defense counsel in many cases at Frankfurt Military Post. Lieutenant Colonel Weisler made no effort to recommend the appointment as defense counsel of any officer not connected with the Finley case because the existence of a possible conflict of interest did not occur to him.

17. Plaintiff had been in arrest in quarters since August 7, 1950. Until attending the pretrial conference on October 6, 1950, he had not been specifically informed that any charges against himself had been sworn to, or that he would be tried. Between these dates plaintiff made no effort to obtain counsel, civil or military. The staff judge advocate's office had not provided him with counsel before October 6, and plaintiff had neither requested nor been refused counsel.

The terms of plaintiff's arrest in quarters were set forth in a written communication which has been lost. However, while under such arrest, plaintiff was permitted to leave for haircuts periodically, and there is no evidence that he was denied the privilege of having visitors or the use of the telephone in his home.

18. On October 6 plaintiff discussed with Captain Adams the question of retaining civilian counsel. Captain Adams advised against it because civilian counsel might antagonize the court-martial, as had occurred in the Finley trial. This advice was an exercise of Captain Adams' best judgment and there is no showing that it was not motivated in the best interests of the plaintiff or was not sound under the circumstances prevailing.

In all, plaintiff had three conferences with Captain Adams after the pretrial investigation and before the trial. The first took place in Captain Adams' car driving from Frankfurt back to Friedberg after the pretrial investigation on October 6, 1950, and consisted of generalizations. The second took place on October 16 and lasted about three hours. On that occasion there was discussion covering the elements of the offense charged and whether the prosecution could prove them, and also discussion as to how to plead. Decision on the latter point was left open. Captain Adams explained to plaintiff the effect of the available ways to plead and told him that the ultimate choice was the plaintiff's. The plaintiff indicated he would be bound by Captain Adams' advice. Although lacking a professional appreciation of the legal requirements to prove the crime charged, plaintiff clearly thought he had committed an offense of some description. He was mentally reconciled to a dismissal from the service as a punishment and at that time was concerned primarily with avoiding imprisonment. He depended on the advice of counsel to select the alternative that would best serve the desired result. The third conference took place a few minutes before the trial convened.

19. Captain Adams' final decision to plead the plaintiff guilty, in which plaintiff acquiesced, was made as he was walking into the courtroom on the day of trial. At this time he told the plaintiff that he would plead him guilty in order to obtain clemency from the reviewing authority. This was their third and last pretrial conference.

Prior to the trial, Captain Adams had discussed with Lieutenant Colonel Weisler, the staff judge advocate, the question of clemency if the plaintiff pleaded guilty. Weisler stated that he would hold out no assurances as it was the policy of the reviewing authority not to make any deals, Prior to the trial, likewise, Captain Adams had considered but rejected the possibility, permissible under military practice, of entering on plaintiff's behalf a plea of guilty to the lesser included offense of an attempt in violation of the 96th Article of War. Captain Adams had discussed this with plaintiff, who was content to rest on the judgment of this counsel.

20. The general court-martial referred to in finding 16 proceeded to the trial of the plaintiff on October 19, 1950. Captain Adams appeared as counsel for the plaintiff and was accepted by him as such. Neither side challenged any member, either peremptorily or for cause. Captain Adams pleaded plaintiff guilty to the specification and the charge. Before accepting the plea the law member explained to plaintiff his rights and the meaning of the plea and plaintiff persisted therein.

The prosecution called four witnesses, including Colonel Taggart, and introduced the statement that the plaintiff had made to agents of the Criminal Investigation Division on August 7, 1950, which is referred to in finding 8. The defense called Colonel Taggart, Major Shelton Gaddis, Lieutenent Hayes, and two enlisted men as character witnesses. Plaintiff took the stand to testify to his personal and military background. He was not asked any questions to elicit what he had told Colonel Taggart, the Criminal

Investigation Division, and the Finley court-martial, namely, that Captain Finley had repeatedly importuned him to take the certificates, although these facts were recited in plaintiff's written statement of August 7, 1950, which statement was part of the record before the court-martial.

Plaintiff was found guilty and was sentenced "to be dismissed the service, to forfeit all pay and allowances to become due after the date of the order directing execution of the sentence, and to be confined at hard labor * * * for two years". The court-martial then adjourned.

21. If, in legal contemplation, a conflict of interest existed between the positions of Captain Finley and the plaintiff so as to disqualify Captain Adams to represent the plaintiff after previously representing Captain Finley, this conflict did not occur to Captain Adams or to the staff judge advocate or to plaintiff, was not explained by Captain Adams or the staff judge advocate to plaintiff, did not cause Captain Adams or the staff judge advocate to explain to plaintiff specifically that he had rights to the assistance of counsel untainted by prior loyalties to a conflicting interest, and did not consciously affect Captain Adams in his defense of plaintiff. It is reasonable to conclude that Captain Adams' defense of plaintiff would have been the same as that which actually transpired even if he had not previously represented Captain Finley.

22. Lieutenant Colonel Weisler, the staff judge advocate, acting pursuant to paragraph 87*b* of the Manual and Article of War 47 (c), recommended in writing on October 24, 1950, approval of findings and sentence, saying as to the latter aspect:

> The cooperation of the accused in testifying at the trial of Captain Willard E FINLEY resulted in a conviction of Captain FINLEY including confinement at hard labor for a period of five (5) years. Without the testimony and cooperation of the accused a conviction could not have been obtained in the case of Captain

FINLEY. In view of the maximum sentence which could have been imposed it is not considered at this time that the term to confinement be mitigated.

Plaintiff's sentence was accordingly approved in its entirety on October 24, 1950, by Brigadier General Basil H. Perry (formerly Colonel), U.S. Army, commanding officer, Frankfurt Military Post, and the record was forwarded for appellate action pursuant to Article of War 48.

23. On October 25, 1950, Captain Adams submitted to the commanding officer, Frankfurt Military Post, a clemency letter on plaintiff's behalf recommending that the portion of the sentence extending to confinement be suspended. In that letter, Captain Adams made these points: (a) Plaintiff made full coufession to Colonel Taggart before the latter suspected any wrongdoing. (b) Plaintiff's confession to the Criminal Investigation Division showed that he did not possess any inherent criminal tendencies. (c) Plaintiff yielded to solicitations and encouragement from a senior officer. (d) Plaintiff materially aided the military authorities by testifying against such officer, waiving his own right against self-incrimination. (e) Plaintiff cooperated with the military authorities at the risk of his own liberty. (f) "The money involved in this case was discovered while it was still in the vault, and therefore under the control of the Army authorities. As a result, the government suffered no loss of funds."

These matters set forth in the foregoing letter were not presented to the court-martial after it found the plaintiff guilty and before it adjudged his sentence. The letter itself was not submitted by Captain Adams until one day after the action of the reviewing authority referred to in finding 22, and so was not available for consideration by the reviewing authority.

24. On October 30, 1950, Lieutenant Colonel Weisler completed his review of Captain Finley's record of trial. He held it legally sufficient and, with respect to sentence, advised the reviewing authority as follows:

> Lt. KRIVOSKI has been tried for his participation in the larceny of the money involved in this case. Upon a plea of guilty the court before which his case was tried imposed a sentence of Dismissal, total forfeiture and confinement at hard labor for two years. The reviewing authority approved this sentence in its entirety and the case has been forwarded to the Office of The Judge Advocate General pursuant to Article of War 48. It is believed that the 5 years confinement imposed in this case appears to be somewhat disproportionate to the sentence imposed in the KRIVOSKI case inasmuch as the two officers involved are equally involved in the offenses charged against them of which they have been found guilty. However, there is to be considered in this case the offense involving the larceny and disposition of the projector and sound equipment which justifies, in my opinion, a more severe sentence in the case of Capt. FINLEY. Accordingly, it is recommended that the sentence in this case be approved but that the confinement at hard labor be reduced to three years. * * *

On October 31, 1950, Captain Finley's sentence was accordingly approved by General Perry who, however, reduced the period of confinement to three years, as recommended, and forwarded the record under the 48th Article of War.

25. Captain Finley and the plaintiff were severally confined upon the announcement of their respective sentences and, in due course, were transferred to confinement facilities at Fort Jay, Governors Island, New York. Their respective records of trial meanwhile reached the Office of The Judge Advocate General, United States Army, Captain Finley retained as appellate counsel Thomas H. King, Esq., of Washington, D. C. Plaintiff also sought to retain Mr. King and sent him a copy of his record of trial and a retainer.

On November 30, 1950, Mr. King declined the plaintiff's representation because of his apprehension of a possible conflict of interest between plaintiff's case and that of

Captain Finley, essentially because plaintiff implicated Finley and the latter denied having importuned plaintiff. Mr. King accordingly transmitted plaintiff's record of trial and the full remittance, without any deduction or forwarding fee, to plaintiff's present counsel.

This was the first intimation plaintiff had from any source that Captain Adams' representation of both Captain Finley and the plaintiff involved a possible conflict of interest.

26. Present counsel for the plaintiff argued and briefed plaintiff's case before a Board of Review in the Office of The Judge Advocate General of the Army which, on December 14, 1950, affirmed plaintiff's conviction.

Thereafter, plaintiff's counsel wrote The Judge Advocate General on December 20, 1950, requesting that he be furnished with the case review made by the staff Judge Advocate and the opinion of the Board of Review, which documents were wanted in order to prepare a presentation to the Judicial Counsel before which the case was then pending. The Judge Advocate General denied the request on December 27.

27. The opinion of the Board of Review referred to in finding 26 is reported at 12 BR-JC 81. That opinion has never been classified in any way and copies of the volume in which it appears are on the open shelves of the Department of Justice and of The Judge Advocate General's Section of the Army Library. Anyone with access to those libraries was free to use the volume.

The review of the staff judge advocate referred to in finding 24 has never been classified for security reasons in any way. It was first made available to plaintiff's counsel at the hearing before the commissioner in October 1954 and was admitted as a plaintiff's exhibit. The review of the staff judge advocate in the Finley case is similarly not classified. That document was included in the record of trial in the Finley case which was produced in response to a call and is an exhibit in this case.

28. Plaintiff's case was argued and briefed before the Judicial Counsel which, on March 12, 1951, confirmed plaintiff's conviction but recommended that the confinement be reduced one year. On March 19, 1951, The Judge Advocate General concurred in that action and reduced the confinement accordingly. These further appellate proceedings are reported at 12 BR-JC 87 and 95.

Plaintiff's dismissal from the Army was announced in General Court-Martial Orders No. 35, Department of the Army, 1951, as effective from midnight, March 30, 1951.

Plaintiff remained in confinement until July 2, 1951, at which time he was released on parole. His parole expired on August 18, 1951.

29. A petition for new trial pursuant to Article of War 53, as reenacted by section 12 of the act of May 5, 1950, was filed on plaintiff's behalf on October 2, 1951. On December 11, 1951, oral argument thereon was held before The Judge Advocate General who, on January 2, 1952, denied said petition.

30. The facts presented in this report were available and presented to the military authorities reviewing plaintiff's successive applications.

31. Since his release from confinement, plaintiff has earned the following sums in civilian employment: 1951 $1,028.35; 1952, $3,685.61; 1953, $4,194.08. His earnings in 1954 were at the rate of $82.50 weekly, plus overtime of from $37 to $40 per week. In 1952 he made a profit of $404.62, and in 1953 one of $158.40 from a store which he and his wife operated jointly.

CONCLUSION OF LAW

Upon the foregoing findings of fact, which are made a part of the judgment herein, the court concludes as a matter of law that the plaintiff is not entitled to recover, and the petition is therefore dismissed.

APPENDIX B

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

1. Constitutional Provisions

The Fifth Amendment provides in pertinent part:

> "No person shall * * * be deprived of life, liberty, or property, without due process of law; * * *."

The Sixth Amendment provides in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right * * * to have the Assistance of Counsel for his defence."

2. Statutes

(2) The statutes here involved are primarily the 1948 Articles of War (Act of June 4, 1920, as amended by Title II of the Act of June 24, 1948, 10 U. S. C. [Supp. II to 1946 ed.] §§ 1471-1593). The provisions that bear directly on the present case are here set out:

> ART. 11. APPOINTMENT OF TRIAL JUDGE ADVOCATES AND COUNSEL.—For each general or special court-martial the authority appointing the court shall appoint a trial judge advocate and a defense counsel, and one or more assistant trial judge advocates and one or more assistant defense counsel when necessary: *Provided*, That the trial judge advocate and defense counsel of each general court-martial shall, if available, be members of the Judge Advocate General's Corps or officers who are members of the bar of a Federal court or of the highest court of a State of the United States: *Provided further*, That in all cases in which the officer appointed as trial judge advocate shall be a member of the Judge Advocate General's Corps, or an officer who is a member of the bar of a Federal court or of the highest court of a State, the officer appointed as defense counsel shall likewise be a mem-

ber of the Judge Advocate General's Corps or an officer who is a member of the bar of a Federal court or of the highest court of a State of the United States: *Provided further,* That when the accused is represented by counsel of his own selection and does not desire the presence of the regularly appointed defense counsel or assistant defense counsel, the latter may be excused by the president of the court: *Provided further,* That no person who has acted as member, trial judge advocate, assistant trial judge advocate or investigating officer in any case shall subsequently act in the same case as defense counsel or assistant defense counsel unless expressly requested by the accused: *Provided further,* That no person who has acted as member, defense counsel, assistant defense counsel, or investigating officer in any case shall subsequently act in the same case as a member of the prosecution: *Provided further,* That no person who has acted as member, trial judge advocate, assistant trial judge advocate, defense counsel, assistant defense counsel, or investigating officer in any case shall subsequently act as a staff judge advocate to the reviewing or confirming authority upon the same case.

* * * * *

ART. 17. TRIAL JUDGE ADVOCATE TO PROSECUTE; COUNSEL TO DEFEND.—The Trial judge advocate of a general or special court-martial shall prosecute in the name of the United States, and shall, under the direction of the court, prepare the record of its proceedings. The accused shall have the right to be represented in his defense before the court by counsel of his own selection, civil counsel if he so provides, or military if such counsel be reasonably available, otherwise by the defense counsel, duly appointed for the court pursuant to Article 11. Should the accused have counsel of his own selection, the defense counsel and assistant defense

counsel, if any, of the court, shall, if the accused so desires, act as his associate counsel.

* * * * *

ART. 24. COMPULSORY SELF-INCRIMINATION PROHIBITED.—No witness before a military court, commission, court of inquiry, or board, or before any officer conducting an investigation, or before any officer, military or civil, designated to take a deposition to be read in evidence before a military court, commission, court of inquiry, or board, or before an officer conducting an investigation, shall be compelled to incriminate himself or to answer any question the answer to which may tend to incriminate him or to answer any question not material to the issue or when such answer might tend to degrade him.

The use of coercion or unlawful influence in any manner whatsoever by any person to obtain any statement, admission or confession from any accused person or witness, shall be deemed to be conduct to the prejudice of good order and military discipline, and no such statement, admission, or confession shall be received in evidence by any court-martial. It shall be the duty of any person in obtaining any statement from an accused to advise him that he does not have to make any statement at all regarding the offense of which he is accused or being investigated, and that any statement by the accused may be used as evidence against him in a trial by court-martial.

* * * * *

ART. 48. CONFIRMATION.—In addition to the approval required by article 47, confirmation is required as follows before the sentence of a court-martial may be carried into execution, namely:

* * * * *

(*c*) By the Judicial Council, with the concurrence of The Judge Advocate General, with respect to any sentence—

* * * * *

(3) involving the dismissal of an officer other than a general officer, * * *

* * * * *

ART. 50. APPELLATE REVIEW.—

* * * * *

(*d*) *Action by board of review when approval by President or confirming action is required.*—Before any record of trial in which there has been adjudged a sentence requiring approval or confirmation by the President or confirmation by any other confirming authority is submitted to the President or such other confirming authority, as the case may be, it shall be examined by the Board of Review which shall take action as follows:

(2) In any case requiring confirming action by the Judicial Council with or without the concurrence of The Judge Advocate General, when the Board of Review is of the opinion that the record of trial is legally sufficient to support the sentence it shall submit its opinion in writing to the Judicial Council for appropriate action.

(3) When the Board of Review is of the opinion that the record of trial in any case requiring confirming action by the President or confirming action by the Judicial Council is legally insufficient to support the findings of guilty and sentence, or the sentence, or that errors of law have been committed injuriously affecting the substantial rights of the accused, it shall submit its holding to the Judge Advocate General and when the Judge Advocate General concurs in such holding, such findings and sentence shall

thereby be vacated in accord with such holding and the record shall be transmitted by the Judge Advocate General to the appropriate convening authority for a rehearing or such other action as may be proper.

(4) In any case requiring confirming action by the President or confirming action by the Judicial Council in which the Board of Review holds the record of trial legally insufficient to support the findings of guilty and sentence, or the sentence, and the Judge Advocate General shall not concur in the holding of the Board of Review, the holding and the record of trial shall be transmitted to the Judicial Council for confirming action or for other appropriate action in a case in which confirmation of the sentence by the President is required under article 48 (*a*).

* * * * *

(*h*) *Finality of court-martial judgments.*—The appellate review of records of trial provided by this article, the confirming action taken pursuant to articles 48 or 49, the proceedings, findings, and sentences of courts-martial as heretofore or hereafter approved, reviewed, or confirmed as required by the Articles of War and all dismissals and discharges heretofore or hereafter carried into execution pursuant to sentences by courts-martial following approval, review, or confirmation as required by the Articles of War, shall be final and conclusive, and orders publishing the proceedings of courts-martial and all action taken pursuant to such proceedings shall be binding upon all departments, courts, agencies, and officers of the United States, subject only to action upon application for a new trial as provided in article 53.

* * * * *

ART. 53. PETITION FOR NEW TRIAL.—Under such regulations as the President may prescribe, the Judge Advocate General is authorized upon application of an accused person, and upon good cause shown, in his discretion to grant a new trial, or to vacate a sentence, restore rights, privileges, and property affected by such sentence, and substitute for dismissal, dishonorable discharge, or bad conduct discharge previously executed a form of discharge authorized for administrative issuance, in any court-martial case in which application is made within one year after final disposition of the case upon initial appellate review: *Provided*, That with regard to cases involving offenses committed during World War II, the application for a new trial may be made within one year after termination of the war, or after its final disposition upon initial appellate review as herein provided, whichever is the later: *Provided*, That only one such application for a new trial may be entertained with regard to any one case: *And provided further*, That all action by the Judge Advocate General pursuant to this article, and all proceedings, findings, and sentences on new trials under this article, as approved, reviewed, or confirmed under articles 47, 48, 49, and 50, and all dismissals and discharges carried into execution pursuant to sentences adjudged on new trials and approved, reviewed, or confirmed, shall be final and conclusive and orders publishing the action of the Judge Advocate General or the proceedings on new trial and all action taken pursuant to such proceedings, shall be binding upon all departments, courts, agencies, and officers of the United States.

* * * * *

ART. 93. VARIOUS CRIMES.—Any person subject to military law who commits manslaughter, mayhem, arson, burglary, housebreaking, robbery, larceny, perjury, forgery, sodomy, assault with intent to commit

any felony, assault with intent to do bodily harm with a dangerous weapon, instrument, or other thing, or assault with intent to do bodily harm, shall be punished as a court-martial may direct: *Provided,* That any person subject to military law who commits larceny or embezzlement shall be guilty of larceny within the meaning of this article.

* * * * *

ART. 96. GENERAL ARTICLE.—Though not mentioned in these articles, all disorders and neglects to the prejudice of good order and military discipline, all conduct of a nature to bring discredit upon the military service, and all crimes or offenses not capital, of which persons subject to military law may be guilty, shall be taken cognizance of by a general or special or summary court-martial, according to the nature and degree of the offense, and punished at the discretion of such court.

(b) The provision of the Uniform Code of Military Justice analogous to AW 50(h) of 1948, *supra* p. A31, is Article 76, 50 U.S.C. § 663, which is as follows:

ART. 76. FINALITY OF COURT-MARTIAL JUDGMENTS.

The appellate review of records of trial provided by this code, the proceedings, findings, and sentence of courts-martial as approved, reviewed, or affirmed as required by this code, and all dismissals and discharges carried into execution pursuant to sentences by courts-martial following approval, review, or affirmation as required by this code, shall be final and conclusive, and orders publishing the proceedings of courts-martial and all action taken pursuant to such proceedings shall be binding upon all departments, courts, agencies, and officers of the United States, subject only to action upon a petition for a new trial as provided in article 73 and to action by the Secretary of a Department as provided in article 74, and the authority of the President.

3. Regulations

The regulations here involved are those in the *Manual for Courts-Martial, U. S. Army, 1949*, prescribed by the President (Ex. Order 10020, 13 Fed. Reg. 7519), pursuant to the authority contained in AW 38 to "prescribe the procedures, including modes of proof, in cases before courts-martial, * * * which regulations shall, insofar as he shall deem practicable, apply the principles of law and rules of evidence generally recognized in the trial of criminal cases in the district courts of the United States: * * *."

The provisions of the MCM that bear directly on the present case are here set out:

43. DEFENSE COUNSEL. *a.* **Selection; relief; absence.**— He will be carefully selected. * * *

It is a purpose of Article 11 to insure that an accused person shall have the right, subject to express waiver, to be represented at his trial by general or special court-martial by a legally qualified lawyer in every case in which the prosecution is conducted by an officer so qualified. Necessary action will be taken at all stages of the proceedings to provide such representation. See 6.

A report of facts will be made at once to the appointing authority for his appropriate action, whenever it appears to the president of the court or to the defense counsel himself that the latter is for any reason, including bias, prejudice, hostility toward the accused, disqualification as above noted or otherwise, unable promptly and impartially to perform his duties in any case. For a proper reason (e. g., preparation of another case) the court, if in session, otherwise the president, may with the express consent of the accused excuse from attendance during a trial such of the personnel of the defense as will not be required.

b. **Duties.**—When the defense is not in charge of individual counsel the duties of defense counsel are those outlined in 45*b*. When the defense is in charge of individual counsel,

civil or military, the duties of defense counsel as associate counsel are those which the individual counsel may designate.

When charges are referred to a court for trial the defense counsel will inform the accused immediately that he has been detailed to defend him at the trial, explain his general duties and advise him of his right to select individual counsel, civil or military, of his own choice pursuant to Article 17. If the accused expresses a desire to be represented by individual counsel, the defense counsel will immediately report the fact to the appointing authority through proper channels and take appropriate steps to secure and consult the requested counsel and render any other desired assistance in behalf of the accused. Unless the accused otherwise desires, the defense counsel will undertake the immediate preparation of the defense without waiting for the appointment or the retaining of any individual counsel.

* * * * * *

45. INDIVIDUAL COUNSEL FOR THE ACCUSED.—

* * * * * *

b. **Duties in general; freedom in conducting defense.**—An officer or other military person acting as individual counsel for the accused before a general or special court-martial will perform such duties as usually devolve upon the counsel for a defendant before civil courts in a criminal case. He will guard the interests of the accused by all honorable and legitimate means known to the law. It is his duty to undertake the defense regardless of his personal opinion as to the guilt of the accused; to disclose to the accused any interest he may have in connection with the case, any ground of possible disqualification, and any other matter which might influence the accused in the selection of counsel; to represent the accused with undivided fidelity, and not to divulge his secrets or confidence. It is improper for him to assert in argument his personal belief in the ac-

cused's innocence or to tolerate any manner of fraud or chicane.

• • • • • •

99. BRIEFS, ARGUMENTS, AND RECOMMENDATIONS.— Under rules prescribed by The Judge Advocate General briefs, including points and authorities with respect to the legality of the proceedings and matters in mitigation and other pertinent matter, may be presented to the Office of The Judge Advocate General by or in behalf of accused persons. The accused will not be permitted to present oral arguments in person. • • •

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 533

DUSIAN ALFRED KRIVOSKI, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the United States Court of Claims (Pet. App. pp. A1–A9) is not yet reported.

JURISDICTION

The decision of the Court of Claims, dismissing the petition filed in that court (Pet. App. A1, A9), was entered on October 2, 1956 (Pet. App. A1). The petition for a writ of certiorari was filed on October 29, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. 1255 (1).

QUESTION PRESENTED

Whether in this suit by an ex-Army officer for pay which he would have earned had he not been dis-

missed from the service by sentence of a court-martial the Court of Claims properly held that there was no basis for treating the judgment of conviction as a nullity.

STATUTE INVOLVED

The pertinent provisions of Articles 48 and 50 of the Articles of War of 1948 are set forth in the Appendix, *infra*, pp. 17–19.

STATEMENT

In August 1950, petitioner was a First Lieutenant, Finance Department, Army of the United States, attached to an Army Finance Center at Friedberg, Germany (Fdgs. 2, 3, Pet. App. A10). On August 3, 1950, while an experiment for the destruction of military payment certificates [1] was in progress, Colonel Taggart, who was in charge of the Finance Center, discovered a metal cashier's box in the corridor room of the vault. Upon opening the box, he found that it contained $9,900 in military payment certificates. When petitioner heard that Colonel Taggart had found the metal box, he sought him out and confessed to him that he had placed the certificates in the box with the intent to purloin them. He stated that he had done this at the instigation of a fellow officer, Captain Finley, who repeatedly had suggested—the last time

[1] Military payment certificates were used in Germany for the payment of military and civilian personnel in order to prevent the transfer to the United States of black market profits. These certificates were periodically withdrawn and exchanged for new ones at extremely short notice (Fdg. 4, Pet. App. A11), in order to prevent their acquisition by unauthorized persons for speculative or investment purposes.

at noon that very day—that petitioner should remove from the vault[2] mutilated certificates slated for destruction, and that the two men should divide the proceeds (Fdgs. 5–7, Pet. App. A11–A12).

A few days later, petitioner and Captain Finley were placed under arrest in their quarters. Contemporaneously, petitioner, after having been advised of his constitutional rights, made a full written statement of the incident, admitting his own guilt and implicating Captain Finley (Fdg. 8, Pet. App. A12–A13). Thereafter, charges were preferred against petitioner and Captain Finley, and the case against the latter referred for trial to a general court-martial (Fdgs. 9–10, Pet. App. A13–A15).

The trial of Captain Finley commenced on September 28, 1950 (Fdg. 13, Pet. App. A16). Finley's military defense counsel was Captain Adams of the Texas Bar. He was principally defended, however, by Mr. Teiger, an American civilian lawyer practicing in Germany (Fdgs. 11, 13, Pet. App. A15–A17). At the trial, petitioner was the principal witness for the prosecution. Again advised of his rights, he testified in detail with respect to his own participation in the crime (Fdg. 14, Pet. App. A17). Finley was convicted on the basis of petitioner's testimony (*ibid.*; Fdg. 22, Pet. App. A22–A23) and sentenced to dismissal from the service and five years' confinement at hard labor.[3]

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[2] As deputy disbursing officer, petitioner had full access to the vault (Fdg. 3, Pet. App. A10).

[3] The confinement was reduced to three years by the reviewing authority (Fdg. 27, Pet. App. A25–A26), and subsequently to two years by the Judge Advocate General, acting upon recommendation of the Judicial Council (Pet. 15).

After the final adjournment of Captain Finley's court-martial on October 3, 1950, charges against petitioner were referred to pre-trial investigation. Captain Adams, who had been co-counsel to Captain Finley, appeared at that pre-trial investigation and offered, alternatively, to represent petitioner or to obtain other counsel for him; petitioner stated that he had no objection to being represented by Captain Adams at the pre-trial proceedings (Fdg. 15, Pet. App. A17–A18).

Thereafter, petitioner discussed with Captain Adams the advisability of obtaining civilian counsel. Captain Adams advised against it on the ground that a civilian attorney might antagonize the court-martial, as had happened during the Finley trial (Fdg. 18, Pet. App. A20). Prior to his trial, petitioner had three conferences with Captain Adams. He had reconciled himself to dismissal from the service and was primarily concerned with the avoidance of imprisonment. Accordingly, he sought Captain Adams' advice as to the strategy which would best serve this purpose (Fdg. 18, Pet. App. A20). Captain Adams finally recommended that petitioner should plead guilty and try to obtain clemency from the reviewing authority (Fdg. 19, Pet. App. A21).

At the general court-martial, Captain Adams appeared for petitioner, and petitioner accepted him as counsel. Captain Adams submitted a plea of guilty for petitioner. Before the plea was accepted, the law member of the court explained to petitioner his rights and the meaning of the plea; petitioner, however,

persisted in pleading guilty (Fdg. 20, Pet. App. A21). After the plea was accepted, the court took some testimony during which the defense called several character witnesses. Petitioner, himself, took the stand, testifying as to his personal and military background.

The court-martial found petitioner guilty, directed that he be dismissed from the service and confined for a term of two years (Fdg. 20, Pet. App. A22). In view of the maximum term which could have been imposed, the reviewing authority decided not to mitigate the term of confinement (Fdg. 22, Pet. App. A22–23). After the trial, Captain Adams submitted a clemency petition. It was too late, however, to be considered by the court or by the reviewing authority (Fdg. 23, Pet. App. A23).

Under Articles of War 48 (c) (3) and 50 (d), as amended by the Selective Service Act of 1948[4] (*infra*, pp. 17, 18), a sentence involving the dismissal of an officer had to be examined by a Board of Review[5] for legal sufficiency (Art. 50 (d) *infra*, p. 18), and confirmed by the Judicial Council[6] with the concurrence of the Judge Advocate General. When the court-martial records of petitioner and Captain Finley reached the Office of the Judge Advocate General for review and confirmation, Captain Finley retained one Thomas H. King as counsel. Petitioner also sought to retain

[4] Hereafter referred to as the Articles of War of 1948.

[5] Under the Articles of War of 1948, a Board of Review consisting of three officers was constituted in the Office of the Judge Advocate (Art. 50 (a), *infra*, p. 17).

[6] The Judicial Council was also constituted in the Office of the Judge Advocate General; it consisted of three general officers (Art. 50 (a) *infra*, p. 17).

Mr. King. The latter, however, declined to represent petitioner in view of a possible conflict of interest between petitioner and Captain Finley. Petitioner thereupon engaged the services of the attorney who is still representing him (Fdg. 25, Pet. App. A24–A25).

Petitioner's case was argued and briefed before a Board of Review, which held that the record of the trial was legally sufficient to support the sentence (Fdg. 26, Pet. App. A25), and submitted its opinion in writing to the Judicial Council as required by Article of War 50 (d) (2). At this juncture, petitioner's attorney requested a copy of the case review made by the Staff Judge Advocate and the opinion of the Board of Review. This request was denied by The Judge Advocate General (Fdg. 26, Pet. App. A25).[7] Thereafter, petitioner's attorney briefed and argued the case before the Judicial Council. On March 12, 1951, the Council recommended that petitioner's term of confinement be reduced to one year; in all other respects, it confirmed the sentence. The Judge Advocate General concurred in this recommendation on March 19, 1951 (Fdg. 28, Pet. App. A26).

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[7] We have been advised by the Department of the Army that, while the Articles of War of 1948 were in effect, the Office of the Judge Advocate of the Army considered the opinion of the Board of Review to constitute a tentative advisory matter to be released only after the Judicial Council and The Judge Advocate General had taken final action in the case. This practice does not extend to the rulings of the Boards of Review established by Article 66 of the Uniform Code of Military Justice, 64 Stat. 128, 50 U. S. C. 653.

On July 2, 1951, petitioner was released on parole.[8] Since he had been taken into confinement only upon pronouncement of the sentence, *i. e.*, on October 19, 1950 (Fdgs. 25, 20, Pet. App. A24, A21), the total duration of his imprisonment amounted to approximately 8½ months. His dismissal from the service became effective from midnight, March 30, 1951 (Fdg. 28, Pet. App. A26).

On May 14, 1952, petitioner filed a complaint in which he alleged that his dismissal from the service was void and illegal, and that he was still entitled to pay as a First Lieutenant. The alleged invalidity of the dismissal was rested on the assertions (1) that the court-martial lacked jurisdiction over petitioner because his defense counsel, Captain Adams, had divided loyalties and had represented him in an incompetent manner, and (2) that the review proceedings were fatally defective because of the failure to supply to petitioner's defense counsel the documents requested by him.

The Court of Claims dismissed the complaint. Relying on the decisions of this Court in *Burns* v. *Wilson,* 346 U. S. 137, and *Hiatt* v. *Brown,* 339 U. S. 103, it held that the decision of the court-martial was not subject to collateral attack or judicial review. It also concluded, on the basis of its full examination of the facts, that there had been no fundamental defect or flagrant error in the court-martial proceedings.

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[8] The parole expired on August 18, 1951 (Fdg. 28, Pet. App. A26).

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ARGUMENT

Petitioner has repeatedly admitted his guilt of the felony of which he was convicted; indeed, he has never denied it. At a time when he was apparently fearful that the circumstances of the theft were about to be discovered, petitioner went to his commanding officer and volunteered the full details. Warned of his rights, petitioner made a full written confession. Still later, petitioner, who was solely responsible for implicating another officer, testified to the crime (again, after being warned) at the trial of that other officer—who was convicted and sentenced to five years on the basis of that testimony. At his own trial petitioner, realizing that the crime to which he had confessed would result necessarily in his dismissal from the service, pleaded guilty—after having been fully advised of the meaning of his plea—and threw himself on the mercy of the court in the hope of avoiding a prison term. During the course of subsequent review by the military authorities, petitioner sought clemency (which he received in the form of an ultimate reduction in his sentence from two years to one year) largely on the basis that he had repented and told the full story of his guilt.

During the period that he was in confinement, petitioner did not seek a writ of habeas corpus. For a substantial part of that period, petitioner was no longer represented by military counsel. After his release from confinement, petitioner first challenged the validity of his conviction in a suit for pay filed in the Court of Claims.

We submit that the Court of Claims had no jurisdiction to entertain this suit. In view of the serious charges made in the petition, we shall also point out, for the record, that in fact there has been no violation of any of petitioner's constitutional rights.

1. This Court has long recognized that courts-martial operate in a "self-contained system"[9] subject to control or review in the civil courts only by writ of habeas corpus. As declared in *Wales* v. *Whitney,* 114 U. S. 564, 570, the "civil courts can relieve a person from imprisonment under order of such [military] court only by writ of *habeas corpus,* and then only when it is made apparent that it proceeds without jurisdiction. If there is no restraint there is no right in the civil court to interfere. Its power *then* extends no further than to release the prisoner. It cannot remit a fine, or restore to an office, or reverse the judgment of the military court * * *". These limitations have been repeatedly and recently affirmed. *In re Yamashita,* 327 U. S. 1; *Hiatt* v. *Brown,* 339 U. S. 103; *Whelchel* v. *McDonald,* 340 U. S. 122; *Gusik* v. *Schilder,* 340 U. S. 128; *Goldstein* v. *Johnson,* 184 F. 2d 342 (C. A. D. C.), certiorari denied, 340 U. S. 879; *Stock* v. *Department of the Air Force,* 186 F. 2d 968 (C. A. 4).

Petitioner relies upon *Shapiro* v. *United States,* 107 C. Cls. 650, in which the Court of Claims permitted a collateral attack upon a court-martial conviction. In that case, decided shortly after World War II when there was considerable dissatisfaction with the recent

[9] *Gusik* v. *Schilder,* 340 U. S. 128, 132.

operation of the court-martial system, the court undeniably overstepped the traditional limitations.[10] Since the date of that decision of the Court of Claims, this Court has reaffirmed the settled rule (see citations, preceding paragraph) and Congress has twice revised court-martial procedures so as to provide, *inter alia,* a greater measure of review within the court-martial system. Significantly, both Article 50 (h) of the Articles of War of 1948 (under which articles petitioner was tried), *infra,* p. 19, and Article 76 of the Uniform Code of Military Justice (64 Stat. 132, 50 U. S. C. 663) provide that sentences of courts-martial and dismissals pursuant to such sentences are final, and that courts-martial orders and action taken under such orders "shall be binding upon all departments, courts, agencies, and officers of the United States."

The conclusion that the civil courts lack jurisdiction to grant the relief sought by petitioner is further confirmed by the fact that Congress has made available to petitioner a specific procedure for seeking such relief. Prior to 1946, final orders of courts-martial could be reviewed by habeas corpus while the defendant was incarcerated; in all other situations, relief was obtainable only by way of a private act of Congress. Section 131 of the Legislative Reorganization Act of 1946 prohibited the introduction of bills authorizing or directing the correction of a military or naval record. In lieu of the former remedy by private bill, Section 207 of the Act (60 Stat. 837, 5 U. S. C. 191a)

[10] The Court of Claims notes in its present decision that the circumstances which impelled it in *Shapiro* have no counterpart here (Pet. App. A8).

provides for the establishment of civilian boards for the correction of military records in the offices of the Secretaries of the three armed services. In 1951, the powers of these boards were broadened so as to include authority to confer monetary benefits found to be due as the result of corrective action taken. The boards' jurisdiction, which is as extensive as Congress could grant, embraces the correction of court-martial orders and of actions taken thereunder. *Gordon* v. *United States,* 129 C. Cls. 270; *Goldstein* v. *United States,* 131 C. Cls. 228, certiorari denied, 350 U. S. 888; 40 Op. A. G. 504, 508; 41 Op. A. G. Nos. 1, 8, 35.

Petitioner, in short, has a remedy before the civilian Army Board for the Correction of Military Records. Since the authority of that Board is derived directly from the exclusive, prerogative powers of Congress (cf. 40 Op. A. G. 504, 508; 41 Op. A. G. No. 1, pp. 2–3, No. 8, p. 4), its jurisdiction of the matters of which petitioner complains is also exclusive.

2. As we have shown, it is established doctrine that the exclusive judicial remedy by which the military convict may test the validity of his conviction is by application for a writ of habeas corpus. In such a proceeding, of course, the scope of examination is narrow, being limited to the question whether the court-martial acted within its jurisdiction. Although petitioner lays great stress upon the proposition that there should be some measure of review of court-martial proceedings in federal courts and seeks to bring his case within the doctrine that the defect must be one which goes to jurisdiction, he makes no

effort to explain the failure to proceed by application for writ of habeas corpus—a heavy burden of explanation, one would suppose, in view of the fact that petitioner seeks, by means of a collateral attack advanced in a suit for pay, to have the Court of Claims adjudicate questions of criminal procedure.

It appears additionally that petitioner's claims of deprivation of constitutional rights are wholly insubstantial. If petitioner had proceeded, as he could have, by making timely application to the district court for a writ of habeas corpus, a determination that there had been no fundamental defect in the court-martial proceedings (a conclusion to which the Court of Claims subscribed) would have been eminently correct. In short, even if the issue had been tendered in the proper forum, there would be no occasion for review by this Court.

a. Petitioner's first argument is that he was deprived of his right to counsel, in violation of the Sixth Amendment, because Captain Adams, having participated in the defense of Captain Finley, must have had divided loyalties. Petitioner, who testified as the chief witness at the Finley trial, knew, of course, of Captain Adams' connection with that case. It did not impress him as a sufficient reason for seeking other counsel, although he was offered the opportunity to do so. The simple fact of the matter, as the Court of Claims found, is that petitioner was reconciled to conviction and dismissal (he had already confirmed his guilt several times over and had been

responsible for the conviction of his co-conspirator), and his concern was to secure a sentence as light as possible. It also appears that the decision to plead guilty, made with the advice of Captain Adams, was a sound decision, for petitioner received a sentence of two years, as contrasted with the five years which his co-conspirator, Finley, had previously received from the court-martial. There is good basis for the Court of Claims finding (Fdg. 21, Pet. App. A22): "It is reasonable to conclude that Captain Adams' defense of plaintiff [petitioner] would have been the same as that which actually transpired even if he had not previously represented Captain Finley."

Petitioner says (Pet. 25) that there is one point of law which Captain Adams obviously should have raised—that, since the certificates never left the vault, there was only an attempt to commit larceny, rather than larceny. The validity of that point is very doubtful at best. As stated in the Manual for Courts-Martial, 1949, p. 239, it is the general rule that "any movement of the property or any exercise of dominion over it with the requisite intent is sufficient." Here, the scrip was placed in a metal box with the intent to steal it. In any event, petitioner neglects to point out that there was not even the slightest basis for questioning the sufficiency of the charge (see Pet. App. A15) that petitioner conspired with Captain Finley to commit larceny (as petitioner, himself, had testified at the Finley trial), and that this offense alone carries a maximum penalty of five years. (M. C. M., 1949, p. 139.)

Petitioner also argues that his counsel failed to develop adequately the facts in mitigation of the offense. In view of the light sentence imposed by the court-martial and the further fact that all circumstances which might conceivably justify clemency were fully developed before the Judicial Council (which cut the period of confinement in half), the suggestion that this presents a constitutional issue is strained indeed. It is all the more so when one considers that petitioner, who is making a pay claim, must show that the errors which he alleges are responsible for his *dismissal*. It is, we submit, inconceivable that the Army would have retained a self-confessed thief as an officer of its Finance Department. *Cf.* Article of War 95 which makes dismissal mandatory upon conviction of a charge of behavior "unbecoming an officer and a gentleman." Note, also, that an officer cannot be sentenced to any period of confinement, however short, without being sentenced to dismissal. M. C. M., 1949, p. 130.

b. Petitioner's second contention is that he was denied due process because, prior to the hearing before the Judicial Council, his counsel was denied access to the following: The review of the case written by the Staff Judge Advocate for the advice of the Commanding Officer of the Frankfurt Military Post; the opinion of the Board of Review. Under the then existing practice, it was considered that such opinions were advisory and that they were not to be disclosed or published until the process of review had been completed (see p. 6, n. 7, *supra*).

Whatever view one may take as to the soundness of the above practice, it is apparent that it could have worked no substantial prejudice in this case. The petition states (p. 26) that the "plea of guilty left the sentence as the only issue." Even as to the sentence, however, there was no issue of validity, for it is indisputable that it was far below the maximum that might have been imposed. The only question open in the case was whether petitioner's sentence should be reduced, *as a matter of grace or clemency.* There is no constitutional objection to making such a determination with the aid of reports or opinions not made accessible to the defendant. *Williams* v. *New York*, 337 U. S. 241.

We note, moreover, that petitioner's civilian counsel had full opportunity to present to the Judicial Council, on brief and in oral argument, all matters bearing on the question of clemency which might be favorable to the petitioner, and that the Judicial Council reduced petitioner's confinement from two years to one year. The end result was that petitioner, after time off for good behavior, served eight-and-one-half months for a very serious offense involving a conspiracy and a flagrant breach of trust.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1956.

APPENDIX

1. Art. 48 of the Articles of War of 1948 (62 Stat. 635, 10 U. S. C. (1946 Ed., Supp. II) 1519) provides in pertinent part:

> ART. 48. *Confirmation.*—In addition to the approval required by article 47, confirmation is required as follows before the sentence of a court-martial may be carried into execution, namely:
>
> * * * * *
>
> (c) By the Judicial Council, with the concurrence of The Judge Advocate General, with respect to any sentence—
>
> * * * * *
>
> (3) involving the dismissal of an officer other than a general officer, * * *.
>
> * * * * *

2. Art. 50 of the Articles of War of 1948 (62 Stat. 635–638, 10 U. S. C. (1946 Ed., Supp. II) 1521) provides in pertinent part:

> ART. 50. *Appellate Review.*—
>
> a. *Board of Review; judicial council.*—The Judge Advocate General shall constitute, in his office, a Board of Review composed of not less than three officers of the Judge Advocate General's Department. He shall also constitute, in his office, a Judicial Council composed of three general officers of the Judge Advocate General's Department: *Provided,* That the Judge Advocate General may, under exigent circumstances, detail as members of the Judicial Council, for periods not in excess of sixty days, officers of the Judge Advocate General's Department of grades below that of general officer.
>
> * * * * *

d. *Action by board of review when approval by President or confirming action is required.*— Before any record of trial in which there has been adjudged a sentence requiring approval or confirmation by the President or confirmation by any other confirming authority is submitted to the President or such other confirming authority, as the case may be, it shall be examined by the Board of Review which shall take action as follows:

(2) In any case requiring confirming action by the Judicial Council with or without the concurrence of the Judge Advocate General, when the Board of Review is of the opinion that the record of trial is legally sufficient to support the sentence it shall submit its opinion in writing to the Judicial Council for appropriate action.

(3) When the Board of Review is of the opinion that the record of trial in any case requiring confirming action by the President or confirming action by the Judicial Council is legally insufficient to support the findings of guilty and sentence, or the sentence, or that errors of law have been committed injuriously affecting the substantial rights of the accused, it shall submit its holding to the Judge Advocate General and when the Judge Advocate General concurs in such holding, such findings and sentence shall thereby be vacated in accord with such holding and the record shall be transmitted by the Judge Advocate General to the appropriate convening authority for a rehearing or such other action as may be proper.

(4) In any case requiring confirming action by the President or confirming action by the Judicial Council in which the Board of Review holds the record of trial legally insufficient to support the findings of guilty and sentence, or the sentence, and the Judge Advocate General shall not concur in the holding of the Board of

Review, the holding and the record of trial shall be transmitted to the Judicial Council for confirming action or for other appropriate action in a case in which confirmation of the sentence by the President is required under article 48*a*.

* * * * *

h. Finality of court-martial judgments.—The appellate review of records of trial provided by this article, the confirming action taken pursuant to articles 48 or 49, the proceedings, findings, and sentences of courts-martial as heretofore or hereafter approved, reviewed, or confirmed as required by the Articles of War and all dismissals and discharges heretofore or hereafter carried into execution pursuant to sentences by courts-martial following approval, review, or confirmation as required by the Articles of War, shall be final and conclusive, and orders publishing the proceedings of courts-martial and all action taken pursuant to such proceedings shall be binding upon all departments, courts, agencies, and officers of the United States, subject only to action upon application for a new trial as provided in article 53.

* * * * *

U. S. GOVERNMENT PRINTING OFFICE: 1948

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 533

DUSIAN ALFRED KRIVOSKI, *Petitioner*

v.

THE UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Claims

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PETITIONER'S REPLY MEMORANDUM

The nature of the contentions advanced in the Government's Brief in Opposition renders desirable, perhaps even necessary, a few words in reply.

I. THE GOVERNMENT DOES NOT MEET THE BASIC ISSUES PRESENTED BY THE PETITION.

A. The first question presented in this case (Pet. 2, 14-22) is whether the doctrine of *Johnson* v. *Zerbst*, 304 U.S. 458, is applicable to judgments of conviction by

court-martial. Of the *Shapiro* case, 107 C. Cls. 650, where the Court of Claims answered that question in the affirmative, the Government says that (Br. Op. 10) that "the court undeniably overstepped the traditional limitations."

So did *Johnson* v. *Zerbst* overstep what heretofore had been the traditional habeas corpus limitations on review of criminal judgments rendered in civil courts, as the earlier cases show. E.g., *Matter of Moran,* 203 U.S. 96; *Harlan* v. *McGourin,* 218 U.S. 442; *Matter of Gregory,* 219 U.S. 210. Consequently the Government's stricture on the *Shapiro* case completely begs the basic question presented, viz., whether, at this time, the judgments of courts-martial are subject to the same broad scope of review on collateral attack as are those of state and federal courts.

B. The third question presented by the petition (Pet. 2, 22-27) is whether petitioner was denied the effective assistance of counsel when he was provided with an individual who was tainted by a prior loyalty to a conflicting interest. This appears to be brushed off by the Government (Br. Op. 12) on the ground of waiver—although the very specific findings of the Court of Claims negative any waiver in fact (Fdgs. 16, 21, 25; Pet. App. A19, A22, A24-A25), and although this Court has many times laid it down that only an understanding waiver of constitutional rights can be given effect. *Emspak* v. *United States,* 349 U.S. 190, 198; *Von Moltke* v. *Gillies,* 332 U.S. 708; *Johnson* v. *Zerbst,* 304 U.S. 458, 464.

C. The last question presented (Pet. 2, 27-29) is that petitioner was denied due process when his appellate counsel was denied access, in the course of appellate proceedings subsequent to conviction, to the opinions then under review in those proceedings. To this the Government says simply that the Army's practice was the other way, that those opinions were advisory only (Br. Op. 6, n. 7; 14). No authority is cited for that view, and none, it is

submitted, can be. For it is clear from the terms of AW 50(d) of 1948 (Br. Op. 18-19) that those opinions were not advisory, but were determinative of the future travel of the case. See Pet. 28. And certainly practice is not conclusive as to fairness. The practices condemned by this Court in *Morgan* v. *United States,* 304 U.S. 1, and in *Gonzales* v. *United States,* 348 U.S. 407, were also not invented for those cases alone.

D. The main burden of the Government's Opposition (Br. Op. 8, 14-15) appears to be that petitioner is an unworthy person who was unfit to retain a commission and was lucky to serve as short a time as he did. Counsel had not hitherto supposed that, where the issue went to the constitutional fairness of criminal proceedings, these were appropriate considerations to be advanced, least of all by the Government. But in this instance, the urge to denigrate petitioner oversteps the bounds of accuracy. The statement (Br. Op. 8) that "Petitioner has repeatedly admitted his guilt of the felony of which he was convicted; indeed he has never denied it," is not supported by the present record. True, he admitted and never denied his acts (Fdgs. 6, 7, 8, 14; Pet. App. A12, A13, A17); but he never admitted or confessed the legal effect of what he had done, and one of his principal contentions in this proceeding has been and is that the faithless counsel who was assigned him never presented the obvious legal point that those acts did not amount to a completed felony (see Pet. 25).

II. THE COURT OF CLAIMS HAS JURISDICTION TO REVIEW THE VALIDITY OF COURT-MARTIAL PROCEEDINGS IN A SUIT FOR BACK PAY, AND RESORT TO HABEAS CORPUS IS NOT A PREREQUISITE THERETO.

A. The Government makes the surprising contention (Br. Op. 9, 11) that the Court of Claims lacks jurisdiction to entertain the present suit, because of the "established

doctrine that the exclusive judicial remedy by which the military convict may test the validity of his conviction is by application for a writ of habeas corpus."

The short answer is that, as this Court's reports show, such convictions can also be reviewed by suits for back pay, and, further, that judgments for such back pay have been affirmed. E.g., *United States* v. *Brown,* 206 U.S. 243, affirming 41 C. Cls. 275; cf. *Runkle* v. *United States,* 122 U.S. 543, 560, reversing 19 C. Cls. 396. It is really amazing that the contrary proposition should be put forward in apparent seriousness.

B. And of course prior application for habeas corpus was not a prerequisite to bringing suit in the Court of Claims.

What was a prerequisite, however, in view of *Gusik* v. *Schilder,* 340 U.S. 128, was an application for a new trial under AW 53 of 1948. Such an application was duly made, without success, though after petitioner's release from confinement (Fdg. 29, Pet. App. A26). Even if it be assumed *arguendo* that petitioner was under a duty to pursue the AW 53 remedy immediately after his sentence was ordered executed, that proceeding took three months to complete (*id.*), and so he would have had only five and a half months more to serve at its close. In those circumstances it is plain that any habeas corpus proceedings would have become moot long before appellate review could have been completed, and so would have been useless; and the law, at least up to now, has never required a doing of a vain act. E.g., *Sims* v. *Everhardt,* 102 U.S. 300, 310; *Tacey* v. *Irwin,* 18 Wall. 549, 551.

But of course the short answer is that, if petitioner chose to endure confinement subject to a later test of the legality thereof by a suit for back pay, there is nothing in the statutes or decisions dealing with the jurisdiction of the Court of Claims that made an earlier habeas corpus a prerequisite to such a suit. The only question open was

as to the scope of review once suit was brought—and that is the basic and fundamental question which petitioner asks this Court to resolve.

III. APPLICATION TO THE BOARD FOR CORRECTION OF RECORDS IS NOT A PREREQUISITE TO SUIT IN THE COURT OF CLAIMS.

A. The government argues (Br. Op. 10-11) that petitioner's exclusive remedy was before the Army Board for the Correction of Military Records, a body functioning under what is now 10 U.S.C. [1956 revision] § 1552.

No authority, it is almost superfluous to say, is cited for that proposition.

Indeed, it cannot even be contended that resort to that Board was a prerequisite to suit in the Court of Claims.

To begin with, the jurisdiction of the Board for Correction of Records is permissive; there is no requirement in 10 U.S.C. [1956 revision] § 1552 or in any other statute that relief in a case of the present nature *must* first be sought administratively, such as there was in the renegotiation act (*Lichter* v. *United States,* 334 U.S. 742; *Aircraft & Diesel Corp.* v. *Hirsch,* 331 U.S. 752) or in the wartime price control legislation (*Yakus* v. *United States,* 321 U.S. 414).

Next, the Court of Claims has regularly held that, in the absence of a specific statutory requirement, resort to the administrative remedy is not a prerequisite to suit (*Cuiffo* v. *United States,* 131 C. Cls. 60; *Loth's Executors* v. *United States,* 133 C. Cls. 476, 485), and, specifically, that it is not necessary for one who complains of improper action by the Army to resort to the Board for Correction of Records as a prerequisite to bringing suit in the Court of Claims. *Girault* v. *United States,* 133 C. Cls. 135; *Duff* v. *United States,* 133 C. Cls. 161; *Levine* v. *United States,* 133 C. Cls. 774.

Indeed, the Court of Claims has held that resort to the Board for Correction of Records does not toll the statute, with result that claimants who pursued the course insisted on by the Government here later found themselves barred by limitations in the Court of Claims. *Girault* v. *United States, Duff* v. *United States, Levine* v. *United States,* all *supra; Odell* v. *United States,* No. 145-55, decided November 8, 1955, rehearing denied with opinion, April 3, 1956.

B. In this case, the Government never raised in the Court of Claims any question going either to any necessity for prior resort to the Board for the Correction of Records or to the supposed exclusiveness of that Board's processes. If, however, the Government's present contentions on those points represent a considered change of position, then, plainly, many more cases than just this one will be affected.

Far from being a reason for denying the present petition, therefore, the Government's arguments under this heading would seem to pose a question of such importance as to constitute a further reason for review.

CONCLUSION.

For the foregoing additional reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted.

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DECEMBER, 1956.